179

CLERK'S COPY.

702-948
Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 344

MARGARET CONWAY, PETITIONER,

vs.

GEORGE H. O'BRIEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1940.

CERTIORARI GRANTED OCTOBER 21, 1940.

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United States District Court

DISTRICT OF VERMONT

MARGARET CONWAY

v.

GEORGE H. O'BRIEN

STATEMENT

This suit was commenced by a summons, attachment and complaint, dated December 1, 1938 served upon defendant on December 15, 1938 and returned served on December 16, 1938. Suit was brought by Margaret Conway, a resident of Walpole, New Hampshire against George H. O'Brien, a resident of Rockingham, Vermont, and there has been no change in the parties.

The summons was returnable before the United States District Court for the District of Vermont, and was duly entered.

On December 28, 1938, and within twenty days after the service of the summons, defendant, by Fenton, Wing & Morse, his attorneys, served upon plaintiff's attorneys, his motion for a more definite statement of complaint, together with a notice of hearing on said motion to be had on January 5, 1939; said motion being filed in the office of the Clerk on December 29, 1938.

On January 2, 1939, defendant by his attorneys, forwarded to the Clerk his motion, as a third party plaintiff to bring in one Ralph A. Wilson, of Rockingham, Vermont, as a third-party defendant, in accordance with Rule 14 of the Rules of Civil Procedure. Attached to the motion was the proposed complaint against the third-party defendant, and a copy of the original complaint in said cause.

Said motion and proposed third-party complaint was not filed by the Clerk until February 9, 1939, at which time copies of the motion and proposed complaint were forwarded to plaintiff's attorneys by direction of the District Judge, and hearing thereon was ordered.

On January 9, 1939, after hearing defendant's motion for a more definite statement of complaint, and pursuant to the order of the Court thereon, plaintiff filed her Bill of Particulars (more definite statement of complaint).

On January 18, 1939, and within ten days after the filing of the more definite Statement, defendant filed his answer in said cause.

On February 15, 1939, plaintiff, through her attorneys, filed her answer to motion of defendant to bring in third-party defendant.

Hearing on defendant's motion to bring in third-party defendant was held at Rutland on June 12, 1939, and defendant's motion was denied. The defendant excepted to the denial of said motion as appears from the statement of exceptions filed with the Clerk.

No question was referred to a Commissioner or Commissioners, Master or Referee.

The action arises out of an accident which occurred at Rockingham, Vermont on August 27, 1936 when the automobiles of one Ralph A. Wilson and of the defendant, (in whose car the plaintiff was riding as a guest passenger) were in collision, and wherein the plaintiff received the injuries for which she seeks here to recover damages, alleging that the same were caused by the gross negligence of the defendant.

Defendant specifically denied liability, and by his proposed third-party complaint, alleged that Wilson was solely responsible for the accident.

The cause came on to be heard before the Honorable Harland B. Howe, United States District Judge and a jury at a General Term of said Court at Montpelier, August 1st to August 4th, both inclusive.

There was a verdict for the plaintiff for the sum of Ten

Thousand Dollars, ($10,000.) and judgment was entered thereon for the plaintiff, on the 4th day of August, 1939, with costs. 7

On September 5, 1939, the amount of the supersedeas bond was fixed at Eleven Thousand Dollars ($11,000.) and bond in that amount was duly approved and filed on October 21, 1939.

On October 23, 1939, defendant's notice of appeal (forwarded on October 13, 1939) was filed.

On November 21, 1939, and within forty days from the date of the notice of appeal, an order was entered extending the time for filing the Record on Appeal and docketing the action to December 30, 1939. 8

On December 27, 1939, and before the expiration of the period of extension previously ordered, the time for filing the record was further extended to January 10, 1940.

On January 3, 1940, and before the expiration of the period of extension previously ordered, the time for filing the record was further extended to and including January 16, 1940.

On January 11, 1940, by stipulation of the parties, the Circuit Court of Appeals for the Second Circuit, under Rule 46, through its Clerk, extended the time for filing the record on appeal, docketing the case, and filing appellant's brief to February 15, 1940.

The points upon which the appellant intends to rely on the appeal are the alleged errors (1) in over-ruling defendant's motion for leave to file his third-party complaint and bring in Ralph A. Wilson as a third-party defendant; (2) in over-ruling defendant's motion for the direction of a verdict in his favor; (3) in failing and refusing to comply with defendant's two requests to charge and to the charge as given, as shown by the exceptions thereto; and (4) in permitting inquiries relative to insurance to be injected into the case, as shown by the exceptions in connection therewith. 9

10 **Writ and Officer's Return**

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT

Civil Action, File No. 21
Writ of Attachment.

MARGARET CONWAY,

Plaintiff.

vs.

GEORGE H. O'BRIEN,

11 *Defendant.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE DISTRICT OF VERMONT, OR ANY OF HIS DEPUTIES,

GREETINGS:

You are hereby commanded to attach the Goods, Chattels, or Estate of George H. O'Brien, of Rockingham, in the County of Windham, State of Vermont, to the value of Twenty Thousand ($20,000.00) Dollars, and for want thereof take his body, if it be found within your precinct, and him safely keep, and him notify thereof according to law, and
12 have him to appear before the United States District Court at Burlington, within and for the said District, and also notify him to cause his appearance herein, to be entered with the Clerk of said Court, on or before the expiration of forty-two days from the date hereof, then and there in said Court to answer to the complaint of Margaret Conway, of Walpole, in the County of Cheshire, and State of New Hampshire, now on file in said Court and a copy of which complaint is herewith furnished for making service on the Defendant.

All of which is to the damage of the Plaintiff in the sum of Twenty Thousand ($20,000.00) Dollars, for which, with just costs, the Plaintiff brings this suit.

Writ and Officer's Return

FAIL NOT BUT SERVICE AND RETURN MAKE within twenty-one days from the date hereof.

Witness, the Honorable Harland B. Howe, Judge of the District Court of the United States ,for the District of Vermont, at the City of Rutland, State of Vermont, on this 1st day of December, A. D., 1938.

(SEAL) AUSTIN H. KERIN
Clerk of the Court.

Date December 1, 1938.

Bond filed this 1st day of December, 1938, in the sum of Two Hundred ($200.00) Dollars with sureties, condition for payment of costs as the law directs.

AUSTIN H. KERIN
Clerk of the Court.

UNITED STATES OF AMERICA,
DISTRICT OF VERMONT, } ss.

At Rockingham, in said District, on the 15th day of December, A. D. 1938, I served this writ by attaching as the property of the within named defendant, George H. O'Brien, all the real estate situated in said town of Rockingham, in the county of Windham, in the State and District of Vermont, and bounded as said town is bounded, with all the appurtenances thereto belonging and said defendant's right in equity to redeem the same; and on the same day I caused to be recorded in the Town Clerk's office for the Town of Rockingham, (at Bellows Falls in said Town of Rockingham) in a book kept for that purpose, the substantial parts of this writ, with this my return hereon thereon endorsed at length, and lodged a true and attested copy of the original writ and of this attachment, with a description of the estate so attached, with the Town Clerk of said Town of Rockingham; and on the said 15th day of December, A. D., 1938, at said

Writ and Officer's Return

Rockingham, I served this writ on the within named defendant, George H. O'Brien, by delivering to him a true and attested copy of this writ, with the description of the estate and property so attached, with this my return hereon thereon endorsed.

Attest,

EDWARD L. BURKE
United States Marshal.

By JOHN H. DUGAN
Deputy U. S. Marshal.

Services $4.00
Endorsed:
Returned Served December 16, 1938
A. MYRL BLAKELY
Deputy Clerk.

Complaint

19

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VERMONT

Civil Action, File No. 21

MARGARET CONWAY,

Plaintiff,

vs.

GEORGE H. O'BRIEN,

Defendant.

20

PLAINTIFF'S COMPLAINT

This is a claim brought in the United States District Court for the District of Vermont by Margaret Conway, of Walpole, County of Cheshire, State of New Hampshire, Plaintiff, against George H. O'Brien, of Rockingham, County of Windham, State of Vermont, Defendant.

1. Jurisdiction is founded on diversity of citizenship and by virtue of the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2. On August 27, 1936, on a public highway commonly known as Parker Hill Road in Rockingham, Vermont, the Defendant, by and through his own gross negligence, drove his motor vehicle against another motor vehicle which was lawfully using said highway.

21

3. As a result of the impact of the two cars, the Plaintiff, who was riding as a guest passenger in the rear seat of the Defendant's car, was violently thrown about and injured about her head, neck, spine and shoulders, and was otherwise injured, resulting in the permanent loss of her equilibrium, and was prevented from transacting her business, suffered great pain in body and mind, and will continue to suffer great pain in the future as said injuries are of a per-

manent nature, and will be prevented from transacting her business properly in the future, and incurred expenses for medical attention and hospitalization in the sum of Five Hundred ($500.00) Dollars and will continue to be obliged to expend in the future great sums of money on account of said injuries.

WHEREFORE, the Plaintiff demands judgment against the Defendant in the sum of Twenty Thousand ($20,000.00) Dollars and costs.

MARGARET CONWAY
Plaintiff.

HERBERT G. BARBER
217-218 Barber Building,
Brattleboro, Vermont.
FENTON E. BATTON
220-221 Barber Building,
Brattleboro, Vermont.
Attorneys for the Plaintiff.

Endorsed:
Filed December 1, 1938
AUSTIN H. KERIN, Clerk.
By A. MYRL BLAKELY,
Deputy Clerk.

Summons and Officer's Return

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF VERMONT

Division

Civil Action File No. 21

MARGARET CONWAY, ,

Plaintiff,

v.

GEORGE H. O'BRIEN,

Defendant.

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon Herbert G. Barber, Esq., plaintiff's attorney, whose address is 217-218 Barber Building, Brattleboro, Vermont; and upon Fenton F. Batton, Esq., plaintiff's attorney, whose address is 220-221 Barber Building, Brattleboro, Vermont

an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

AUSTIN H. KERIN
Clerk of Court.

Date: Rutland, Vermont,
December 1, 1938.

28 *Summons and Officer's Return*

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 15th day of December, 1938 I received the within summons and at Rockingham, in the District of Vermont, on the 15th day of December, 1938 I made service thereof by delivering to the within named defendant, George H. O'Brien, a true and attested copy thereof with this my return thereon endorsed, and at the same time I delivered to the said George H. O'Brien a copy of the Original Bill of Complaint.

EDWARD L. BURKE
United States Marshal.

29

By JOHN H. DUGAN
Deputy United States Marshal.

Marshal's Fees

Travel	$5.50
Service	2.50
	$8.00

Subscribed and sworn to before me, this ..... day of ....., 19....

SEAL.....

30

Note:—Affidavit required only if service is made by a person other than a United States Marshall or his deputy.

Endorsed:—

Return Served December 16, 1938
A. Myrl Blakely
Deputy Clerk

Motion for More Definite Statement in Complaint and Notice of Service

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21

MARGARET CONWAY

vs.

GEORGE O'BRIEN

MOTION FOR MORE DEFINITE STATEMENT IN COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT:

Now comes GEORGE H. O'BRIEN, defendant in the above entitled cause, by Fenton, Wing & Morse, his attorneys, and, pursuant to subdivision (e) of Rule 12 of the Rules of Civil Procedure, and within 20 days after the service of the Summons and Complaint therein, respectfully moves that the plaintiff set forth and state more definitely and in more detail the alleged facts upon which the allegation in Paragraph Two of said Complaint, as follows:

> On August 27, 1936, on a public highway, commonly known as Parker Hill Road, in Rockingham, Vermont, the defendant, by and through his own gross negligence, drove his motor vehicle against another motor vehicle which was lawfully using said highway,

is based.

Among other alleged facts, that the defendant set forth with particularity and with more definiteness the following:

Motion for More Definite Statement in Complaint and Notice of Service

(a) The alleged facts which are claimed to constitute negligence on the part of the defendant.

(b) The alleged facts which are claimed to constitute gross negligence on the part of the defendant.

(c) The alleged facts which are claimed to establish a failure on the part of the defendant to exercise due care.

(d) The alleged facts upon which it is claimed that the defendant failed to exercise even a slight degree of care.

(e) The alleged facts which it is claimed constitute any act or omission on the part of the defendant, respecting any legal duty owed to the plaintiff, of an aggravated character.

(f) The alleged facts which it is claimed amount to indifference to any present legal duty and to utter forgetfulness of legal obligations on the part of the defendant that might or did affect the plaintiff.

(g) The alleged facts which it is claimed constitute a heedless and palpable violation of legal duty respecting the rights of the plaintiff.

(h) The name of the person owning or operating the motor vehicle with which it is alleged the automobile of the defendant was in collision.

(i) The alleged facts and circumstances, including the location in the highway of the automobiles referred to, at the time when, and the manner in which said alleged collision occurred.

Dated at the City of Rutland, in the County of Rutland, in the State and District of Vermont, this 28th day of December, A. D. 1938.

FENTON, WING & MORSE
Attorneys for Defendant.
By WALTER S. FENTON

Endorsed:
Filed December 29, 1938
A. MYRL BLAKELY,
Deputy Clerk.

Motion for More Definite Statement in Complaint and Notice of Service 37

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21.

MARGARET CONWAY

vs.

GEORGE O'BRIEN

TO: 38

HERBERT G. BARBER, ESQ.,
217-218 Barber Building
and
FENTON E. BATTON, ESQ.,
220-221 Barber Building,
Brattleboro, Vermont

Attorneys for Plaintiff.

Gentlemen:

We hereby serve upon you defendant's motion to make more definite certain allegations of the plaintiff's Complaint in the above entitled cause, all in accordance with subdivision (e) of Rule 12 of the Rules of Civil Procedure.

Please take notice that the undersigned will bring the above motion on for hearing before Honorable Harland B. Howe, United States District Judge, at his Chambers in the United States Court House at Burlington, Vermont, on the 5th day of January, 1939, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard. 39

FENTON, WING & MORSE
Attorneys for Defendant.
By WALTER S. FENTON
Address:
42-49 Mead Building,
Rutland, Vermont.

Filed December 18, 1938

Letter of January 2d, 1938 to Clerk of United States Court concerning the filing of the motion of defendant to bring in third-party defendant.

COPY

Fenton, Wing and Morse
Mead Building Rutland, Vt.

January 2, 1939

AUSTIN H. KERIN, ESQ.,
Clerk, United States District Court,
Burlington,
Vermont.

Re: Margaret Conway vs. George H. O'Brien
Civil Action No. 21

Dear Mr. Clerk:

We enclose herewith motion of defendant George H. O'Brien as a third-party plaintiff to bring in Ralph A. Wilson, of Rockingham, Vermont, as a third-party defendant, in accordance with Rule 14 of the Rules of Civil Procedure. Attached to the motion is a summons to the third-party defendant and the complaint against the third-party defendant, to which is attached a copy of the original complaint.

If there are any fees to be paid in connection with the filing of this motion, we would appreciate it if you would let us know what they are.

Very truly yours,

FENTON, WING & MORSE.

Encls.
WSF:JD

Motion of Defendant as Third-Party Plaintiff to Bring in a Third-Party Defendant 43

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21.

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN 44

MOTION OF DEFENDANT AS A THIRD-PARTY PLAINTIFF TO BRING IN A THIRD-PARTY DEFENDANT

Defendant, GEORGE H. O'BRIEN, by Fenton, Wing & Morse, his attorneys, moves for leave to make RALPH A. WILSON, of Rockingham, in the County of Windham and State and District of Vermont, a party to this action, and that there be served upon him summons and third-party complaint as set forth in exhibit (A) hereto attached.

FENTON, WING & MORSE 45

By WALTER S. FENTON
Attorneys for Defendant.

GEORGE H. O'BRIEN.

Endorsed:
Filed February 9, 1939
AUSTIN H. KERIN, Clerk.

46 **Complaint of Defendant George H. O'Brien, As a Third-Party Plaintiff, Against Ralph A. Wilson, Third-Party Defendant**

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21

MARGARET CONWAY, Plaintiff

vs.

GEORGE H. O'BRIEN, Defendant
and Third-Party Plaintiff

vs.

RALPH A. WILSON, Third-Party Defendant

COMPLAINT OF DEFENDANT, GEORGE H. O'BRIEN, AS A THIRD-PARTY PLAINTIFF, AGAINST RALPH A. WILSON, THIRD-PARTY DEFENDANT.

PLAINTIFF, MARGARET CONWAY, has filed against defendant, GEORGE H. O'BRIEN, a complaint, a copy of which is hereto attached as Exhibit (C).

48 GEORGE H. O'BRIEN, defendant, as a third-party plaintiff, complains against RALPH A. WILSON, of Rockingham, in the County of Windham and State of Vermont, as a third-party defendant, and alleges:

(1) THAT on the 27th day of August, 1936, at Rockingham in the County of Windham, Vermont, the defendant, GEORGE H. O'BRIEN, was the owner and operator of a certain Ford automobile, which he was then and there driving and operating in a northerly direction over a certain public highway in said town of Rockingham, and was approaching a certain bridge over the Williams River, locally known as the Williams River Bridge, at which point, and just southerly

of the southerly entrance to said bridge, there is located a sharp curve; and that at said time and place the said third-party defendant, RALPH A. WILSON, was driving and operating a certain Dodge automobile in a southerly direction over the same public highway.

(2) THAT it then and there became and was the duty of the third-party defendant, RALPH A. WILSON, to drive and operate the said Dodge automobile:

(a) in a safe, careful and cautious manner;

(b) at a safe, reasonable, moderate and prudent rate of speed;

(c) to have his said automobile at all times under full and complete control;

(d) to keep a lookout for the plaintiff and other persons lawfully using said public highway;

(e) when meeting a vehicle moving in the opposite direction, to exercise due care and to keep to the right of the center of the highway, so as to pass without interference;

(f) to approach and enter all curves with due care to avoid accident, and when rounding such curves to keep as far to the right-hand side of the highway as reasonable and practicable, and proceed with due care to avoid accident.

(g) at all times when driving and operating said Dodge automobile upon the public highway, to have the same in good mechanical condition, equipped with adequate and sufficient brakes;

all for the protection of the third-party plaintiff and other persons then and there lawfully using the said public highway.

(3) THAT said third-party defendant, RALPH A. WILSON, then and there neglected his said duty in the premises in this, to wit, that the said Dodge automobile then and there being driven and operated by the said third-party defendant, RALPH A. WILSON, was then and there being driven and operated;

(a) in an unsafe, careless, imprudent, negligent and incautious manner;

52 *Complaint of Defendant George H. O'Brien, As a Third-Party Plaintiff, Against Ralph A. Wilson, Third-Party Defendant*

(b) at an unsafe, unreasonable, immoderate, reckless and imprudent rate of speed, to wit, forty miles per hour;

(c) that said Dodge automobile was not at all times under full and complete control, but, to the contrary thereof, was without the control of the said third-party defendant;

(d) that said third-party defendant did not keep a careful lookout for the third-party plaintiff and other persons lawfully using said public highway;

(e) that when about to meet and meeting the automobile then and there being driven and operated by the third-party plaintiff, the said third-party defendant did not keep
53 to the right of the center of the highway, so as to meet and pass without interference;

(f) that in approaching and entering the said curve at the southerly end of said Williams River Bridge, above referred to, the said third-party defendant did not approach and enter the said curve with due care to avoid accident, and in rounding the same did not keep as far to the right-hand side of the highway as reasonable and practicable, and did not proceed with due care to avoid accident;

(g) that the said third-party defendant failed to have and keep his said Dodge automobile in good mechanical condition and equipped with adequate brakes; to the contrary, he drove and operated the same upon the public highway aforesaid, at the time and place aforesaid, when said
54 Dodge automobile was not in good mechanical condition, and when the brakes thereon were wholly and totally inadequate to stop said automobile within a reasonable distance or to materially retard or lessen the speed of the same.

(4) THAT on to wit, said 27th day of August, 1936, at the time and place hereinbefore set forth, at Rockingham, aforesaid, while the Ford automobile of the said third-party plaintiff was then and there being driven and operated by him in a careful and prudent manner, and at a rate of speed not exceeding fifteen miles per hour, and on the right-hand side of the center line of said highway, as it approached and

entered the curve leading into said Williams River Bridge, as the third-party plaintiff was proceeding in a northerly direction; the said third-party defendant drove and operated his said Dodge automobile at a fast and excessive rate of speed, to wit, forty miles per hour, in an unsafe, careless, imprudent, negligent and incautious manner, and while the said Dodge automobile by reason thereof and of the inadequacy and insufficiency of its brakes, was wholly beyond the control of the said third-party defendant, into, through and out of said covered bridge and into the curve at the southerly approach thereto, and negligently failed to keep to his right of the center of said highway, and in rounding said curve, to keep as far to the right-hand side of the highway as reasonable and practicable, and to proceed with due care to avoid accident. To the contrary, the said third-party defendant drove and operated his said Dodge automobile in the negligent, careless and incautious manner aforesaid, and as he entered said curve, drove the same to the left of the center line of said highway, and on to that portion of the said highway then lawfully occupied by the third-party plaintiff, and upon and against the said Ford automobile of the third-party plaintiff with great force and violence.

Whereby and by reason thereof the said Ford automobile of the third-party plaintiff was greatly injured and damaged. The left front fender, the left running-board, the front springs, the front axle, and the frame thereof were greatly wrenched, twisted, bent, jammed, broken and sprung out of alignment, and said automobile thereby greatly depreciated in value, and the said third-party plaintiff was greatly wrenched, bruised and injured.

(5) AND WHEREBY also the said plaintiff herein, MARGARET CONWAY, received the alleged injuries set forth in her said complaint;

(6) All without any negligence on the part of the third-party plaintiff (the original defendant in this cause) and solely by reason of the negligence as hereinbefore set forth of said third-party defendant, RALPH A. WILSON, whom

58 *Complaint of Defendant George H. O'Brien, As a Third-Party Plaintiff, Against Ralph A. Wilson, Third-Party Defendant*

this third-party plaintiff alleges and avers is liable to him and is liable to the plaintiff herein, MARGARET CONWAY, for such damages, if any, as it may be adjudged she is entitled to recover, the *ad damnum* in her complaint being set forth to the sum of Twenty Thousand Dollars ($20,000.00).

WHEREFORE, the third-party plaintiff demands judgment against said third-party defendant for all sums, if any, that may be adjudged against defendant GEORGE H. O'BRIEN, in favor of plaintiff, MARGARET CONWAY.

FENTON, WING & MORSE

59

By L. F. WING
Attorneys for Third-Party Plaintiff.
Address:
42-49 Mead Building,
Rutland, Vermont.

Endorsed:
Filed February 9, 1939
AUSTIN H. KERIN, Clerk.

60

Plaintiff's Bill of Particulars

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UNITED STATES DISTRICT COURT,

DISTRICT OF VERMONT.

Civil Action No. 21.

MARGARET CONWAY

v.

GEORGE O'BRIEN

62

PLAINTIFF'S BILL OF PARTICULARS.

Now comes Margaret Conway, plaintiff in the above entitled cause, by Herbert G. Barber and Fenton E. Batton, her Attorneys, and in compliance with the application filed in said cause by the defendant for a bill of particulars from the plaintiff and in pursuance to the order of the Court made thereon, files this her bill of particulars and states as follows:

That the defendant, at the time of said collision, while driving his automobile on the left of his center of the highway, within, to wit, three hundred (300') feet southerly of said covered bridge, which bridge is a part of said highway, and while driving in a northerly direction on the sharp, to wit, ninety (90°) degree curve and steep, to wit, forty-five (45%) per cent down-grade, at the place aforesaid, was driving at a grossly negligent and grossly unsafe rate of speed, to wit, twenty-five (25) miles an hour; that he was grossly negligent in that he failed to give any warning whatsoever on approaching and entering said dangerous curve and the "blind" entrance to the bridge aforesaid; that he was grossly negligent in that he failed to keep any lookout for approaching cars on said highway so as to prevent collision; that he, at the time and place aforesaid, drove and operated his said automobile on said highway in a careless,

63

64 *Plaintiff's Bill of Particulars*

reckless and grossly negligent manner in that he failed to keep his said automobile under control, at a safe rate of speed, and on his right-hand side of the center of said curve on said highway, as he could have done and was his duty to do, for the safety of the plaintiff while a guest passenger in his automobile; all of which gross negligence and wrongful acts resulted in a collision with another car being driven by one Ralph Wilson coming in an opposite or southerly direction at a moderate rate of speed, to wit, fifteen (15) miles an hour, and being driven on Wilson's extreme right-hand side of the center of the highway at which point the collision between the two cars occurred; the proximate cause of said
65 collision resulted solely from the gross negligence of the defendant, all as aforesaid, and thereby resulting in severe and permanent injuries to the plaintiff who was riding as a guest passenger in the rear seat of the defendant's automobile aforesaid.

Dated at Brattleboro, in said District, this the 7th day of January, A. D., 1939.

MARGARET CONWAY,
Plaintiff.

By HERBERT G. BARBER
By FENTON E. BATTON (by H.G.B.),
Her Attorneys.

66 Endorsed:
Filed January 9, 1939.
A. MYRL BLAKELY,
Deputy Clerk.

Defendant's Answer 67

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action—No. 21.

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN 68

DEFENDANT'S ANSWER.

Now comes George H. O'Brien, Defendant in the above entitled cause, by Fenton, Wing & Morse, his Attorneys, and for Answer to the plaintiff's Complaint, as amplified by her Bill of Particulars, heretofore served, says:

1. Defendant is without knowledge or information sufficient to form a belief, as to the allegations of paragraph 1 of said complaint. 69

2. Defendant denies the allegations of paragraph 2 as set forth in the original complaint, and as amplified by the Bill of Particulars filed herein, in connection therewith.

3. Defendant is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of said complaint.

Dated at City of Rutland, in said District this 18th day of January, A. D., 1939.

70 *Defendant's Answer*

FENTON, WING & MORSE

By WALTER S. FENTON
Attorneys for Defendant.

Address:
Mead Building,
Rutland, Vermont.

Endorsed:

Filed January 18, 1939
A. MYRL BLAKELY,
71 Deputy Clerk.

72

Plaintiff's Answer to Motion of Defendant to Bring in Third-Party Defendant 73

UNITED STATES DISTRICT COURT,

DISTRICT OF VERMONT.

Civil Action No. 21.

MARGARET CONWAY,

Plaintiff,

vs.

GEORGE H. O'BRIEN,

Defendant. 74

PLAINTIFF'S ANSWER TO MOTION OF DEFENDANT TO BRING IN THIRD-PARTY DEFENDANT.

Now comes the plaintiff, Margaret Conway, by her Attorneys, Herbert G. Barber and Fenton E. Batton, and moves that the Court deny the motion of the defendant, George H. O'Brien, the right to bring in a third-party defendant, for the following reasons:

1. That the Law of Contribution between Joint Tort-Feasors is not recognized by the State of Vermont. Rule 14 of the New Rules of Federal Procedure is not authority to support the defendant's motion. Rule 14 does not abridge, enlarge or modify the substantive rights of any litigant; 75
it does not establish a right of reimbursement, indemnity nor contribution between Joint Tort-Feasors, nor will it establish the right of Contribution in Vermont where the law of the State is otherwise; it can, therefore, avail the defendant nothing to bring in a third-party defendant, who, so he claims, is a Joint Tort-Feasor.

2. That the bringing in of a third-party defendant in this cause would be prejudicial to the rights of the plaintiff as it would tend to confuse a jury, in that it would befog and cloud the issue.

76 *Plaintiff's Answer to Motion of Defendant to Bring in Third-Party Defendant.*

3. That the defendant, George H. O'Brien, in failing to answer the plaintiff's complaint within twenty (20) days, as allowed by Rule 12, thereby automatically stands on the general issue.

4. That the alleged third-party defendant, under Vermont Law, is not liable to the defendant, George H. O'Brien, for all or any part of the damages sustained by the plaintiff, Margaret Conway. The rule is that the Federal Court will follow the law of the State in the trial of a cause; that if the said Ralph Wilson is liable to George H. O'Brien for damage to O'Brien's automobile or any personal injury,
77 the said O'Brien has a cause of action against him. Any evidence of O'Brien's claim would be irrelevant to the plaintiff's case, and harmful thereto.

5. That the counter-claims of the defendant, George H. O'Brien, are not against the plaintiff, Margaret Conway.

6. That under the law of the State of Vermont, George H. O'Brien is without right to proceed with his cause of action against the said Ralph Wilson in the United States District Court as both parties are residents of the State of Vermont and the said United States District Court is without jurisdiction in such cause; and for the further ground that the amount involved is not alleged to be in excess of Three Thousand ($3,000.00) Dollars.

WHEREFORE, the plaintiff prays that the Court deny
78 the defendant's said motion, which bears no date, on each and every ground herein contained.

MARGARET CONWAY,
Plaintiff.

By HERBERT G. BARBER
By FENTON E. BATTON
Her Attorneys.

Dated this 14th day of February, A. D. 1939.

Endorsed:
Filed February 15, 1939
AUSTIN H. KERIN, Clerk.

Order of Court Denying Motion to Bring in Third-Party Defendant 79

COURT JOURNAL

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

BE IT REMEMBERED, that at Rutland, in said District, on this 12th day of June, A. D., 1939, and of the Independence of the United States the one hundred and sixty-third, 80 there was holden a session of the United States District Court within and for the District of Vermont, at which time proceedings were had and done in the several causes and matters mentioned as hereinafter stated, and on this day there were present the following-named officers:

HON. HARLAND B. HOWE, Judge.

ORDERED that Court be opened and Court was opened accordingly.

In cause No. 21 on the civil docket, Margaret Conway vs. George H. O'Brien, hearing on defendant's motion to join third party defendant; H. C. Barber, Esq., and Fenton E. Batton, Esq., appearing for plaintiff; Walter S. Fenton, 81 Esq., appearing for defendant.

ORDERED motion denied:

No further business appearing, it is

ORDERED that Court take a recess until tomorrow morning.

A true record,

Attest:

AUSTIN H. KERIN

Clerk.

82 **Exceptions to Denial of Motion to Bring in Third-Party Defendant**

FENTON, WING & MORSE
LAWYERS
Mead Building, Rutland, Vt.

Walter S. Fenton
Leonard F. Wing
Charles F. Ryan
R. Clarke Smith
John A. M. Hinsman

June 20, 1939

AUSTIN H. KERIN, Clerk
83 United States District Court
Montpelier, Vermont

Re: Conway v. O'Brien

Dear Mr. Clerk:

In the above case in which the Court has made an order denying the motion of the defendant to bring in Ralph A. Wilson as a third party defendant under Subdivision (a) of Rule 14, the defendant, George H. O'Brien, excepts to the ruling of the Court upon the following grounds:

The motion having been filed before answer, defendant was entitled, as a matter of right, to the granting of the motion, without further notice.

84 Rule 14 applies as well to tort actions as to those based on contract, and denial of motion because the action was in tort, was erroneous.

Rule 14 was designed and intended to provide for bringing into one action all the parties interested in the subject matter in order that the several claims might be litigated in one proceeding, and denial of the motion deprived defendant of the very right and benefit which the Rule was intended to provide, and the ruling was contrary to both the letter and the spirit thereof, and was erroneous.

The denial of the motion was an abuse of discretion, if discretionary.

Exceptions to Denial of Motion to Bring in Third-Party Defendant 85

The foregoing statement of exception is somewhat long and involved but we do not know how to preserve the question without having the setting of the exception appear.

We are forwarding to Judge Howe a copy of this letter and would appreciate it if you would have the record show our exception as stated.

Very truly yours,

FENTON, WING & MORSE

WSF:MB 86

Endorsed:
Filed June 21, 1939,
AUSTIN H. KERIN, Clerk.

87

88

Transcript

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT.

No. 21.

Special July Term, 1939 at Montpelier, Aug. 1-4, before Howe, J. and jury.

89

MARGARET CONWAY

v.

GEORGE H. O'BRIEN.

APPEARANCES:

HERBERT G. BARBER, ESQ.,

90 FENTON E. BATTON, ESQ.,

Attorneys for plaintiff.

FENTON, WING & MORSE, ESQS.,

Attorneys for defendant.

KATHARINE A. GARDNER,
Official Reporter,
Federal Bldg.,
Burlington, Vermont.

Plaintiff's Exhibits.

1. Large plan drawn by Heman Chase.
*2. Small plan drawn by Heman Chase.
3. Colored picture in frame.
4. Photograph.
5. Ditto
6. Ditto
7. Ditto
8. Ditto
9. Ditto
10. Ditto
11. Ditto
12. Ditto 92
13. Ditto
14. Ditto
15. Ditto
16. Ditto
17. Ditto
18. Ditto
19. (2 pp.) Report by Geo. H. O'Brien to Motor Vehicle Dept.

Defendant's Exhibits.

A. Photograph.
B. Ditto
C. Ditto
D. Chart ~~or photostatic~~ copy of report made by Motor Vehicle Department by Ralph A. Wilson. 93
E. Map drawn by Clayton H. Maurice, Jr.

---

*2 (small plan) marked for identification only; not admitted.

(Aug. 1, 1939 in Chambers.)

Mr. Batton: The plaintiff at this time would like to make a motion that the defendant's attorney inform us whether or not there is insurance involved in this matter, the reason being for the purpose of learning

94 whether or not the jurors are qualified to sit on this case, and also whether it is a Stock Company or not?

The Court: What do you say?

Mr. Fenton: I say that is a very funny question to be asking when counsel have seen the policy long ago.

The Court: Well, he's got to make proof of it here.

Mr. Fenton: Is the Court going to permit that line of questioning of the jury?

The Court: If the defendant is insured I think they have a right to find out whether the jurors are disqualified, and they must act in good faith about it.

Mr. Fenton: Well if the Court wishes me to make a
95 statement about that I will.

The Court: If you are willing to, or he can put in his evidence——

Mr. Fenton: I don't want to have it claimed I am voluntarily offering it. I am perfectly willing to inform the Court that there is insurance coverage in this case in the Aetna Casualty and Surety Company, as Mr. Barber very well knows, having seen and examined the policy, but I shall object if any questions are based on that fact, and ask proper exception.

The Court: The defendant is insured against liability in this case—in this accident. Now will you say whether the Insurance Company is a Mutual or a Stock Company?

96 Mr: Fenton: My understanding is it is a Stock Company but I wouldn't like to be bound—but I don't think there's any question of it, and I will state further for the information of the Court, that the addamnum greatly exceeds the coverage, so that the asking of these questions is not only prejudicial to one interest that might be claimed to be involved in the case, but it's particularly prejudicial to the defendant.

The Court: Well I think the plaintiff has the right to find out whether the jurors are qualified or disqualified by a proper question, so you enter, Mrs. Gardner that——do you mind saying the amount of the policy?

97

Mr. Fenton: No, I don't mind saying it. Brother Barber has seen it. I am informing the Court of this fact in view of these questions. My understanding is the coverage is ten thousand dollars ($10,000.).

The Court: All right, you may enter that I find the fact to be that the defendant in this case is insured against liability for the damages which the plaintiff seeks to recover, and that the insurance is $10,000.00.

Mr. Fenton: Now will you note my exception to the finding as wholly immaterial and incompetent? Our view is that the matter is not a proper subject for consideration. I would like to have it appear on the record at this time that the plaintiff's counsel seem to have the 98
policy in their hands.

The Court: Well that may be so and still have to prove the facts, as they have.

Mr. Fenton: I don't know where they got it.

(In courtroom.)

JURY.

1.	Frank Kellogg, Foreman	Randolph.
2.	F. J. Eaton,	Bradford.
3.	C. E. Dickerman,	Roxbury.
4.	Wilbur I. Lawrence,	Montpelier. 99
5.	Royal P. Abbott,	Brookfield.
6.	Gerald Wilson,	Thetford.
7.	E. Barton Camp,	Randolph.
8.	Bert Holt,	E. Montpelier.
9.	Norman Hunt,	Williamstown.
10.	Bernard W. Leavitt,	Bradford.
11.	George C. Flint,	Braintree.
12.	Harold Morse,	Duxbury.

Brief sketch of case outlined to the jury by the Court.

100 Mr. Batton: I would like to ask, may it please the Court, whether any member of this jury is employed by or has any financial interest in the Aetna Casualty & Surety Company?

The Court: No—all right.

Mr. Batton: Have any of you gentlemen ever been either plaintiff or defendant in an automobile accident?

The Court: No. Any questions?

Mr. Fenton: No questions, Your Honor.

Jury is empaneled at 2:10 p. m.

101 Plaintiff's claims outlined to jury by Mr. Batton.
Defendant's claims outlined to jury by Mr. Fenton.

HEMAN CHASE called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Batton:

Q. Will you state your name, please? A. Heman Chase.

Q. And your residence? A. Alstead, New Hampshire.

Q. And your occupation? A. Surveying.

Q. How long have you been a surveyor, Mr. Chase?

102 A. Since—since 1923.

Q. And what college did you attend?

The Court: Never mind that; that's enough.

Q. At one time, sometime last February 1939, were you requested by me to go to the Williams River bridge and draw up plans and specifications of that bridge and the road leading into it from the southerly direction? A. Draw up plans, yes.

Q. Did you draw those plans? A. Yes.

103

Q. Did you later, in the month of July 1939 recheck those plans? A. Yes sir.

Q. So that the conditions in the drawings show what the plan actually is under summer conditions? A. Yes sir.

Q. I show you plan marked Plaintiff's 1 and ask you what that is, please? A. That is the map that I made at your request, showing the road—that part of the road, which you asked me to map.

Q. Will you describe for the bene of the jury what the line A-B represents there? A. These lines represent the edge of the traveled way of the highway as well as I was able to pick the exact edge of the traveled way. Being a gravel way it, of course, has no definite edge, but this was as nearly—as substantially as I could select, the edge of the traveled way, so as to show the width of that part of the road that anyone would drive over.

104

Q. And is this level or hilly or what, please? A. This is a hill (indicating) from about point "A" down all the way to the end of the bridge.

Q. That would be point "C"? A. Yes.

Q. What do these lines here with the little dots represent? A. Those are fence posts with the fence rails between.

Q. This, as shown by the map, is just on the outside of the regular line of travel there? A. Yes.

Q. Are these fence posts and rails over here (indicating)? A. Yes. This (indicating) was a post that there was no rail to; it stands out alone—with no rail coming to it.

105

Q. What do these heavy lines represent? A. Those are the spans of the wooden bridge.

Q. They represent the bridge really? A. Yes.

Q. From point "C" to the upper end of the map here (indicating), the heavy lines represent the bridge? A. Yes, with lattice work on each side of the covered bridge.

Q. Now this opening here (indicating)—and here—what do they represent? A. They represent openings in the boarding for vision.

106 Q. Now what is the name of this bridge? A. Williams River bridge as far as I know.

Q. What is the relation between this road and between the bridge—by that I mean does it parallel the river, or is it coming in at an angle? A. Well, it's coming in more or less at an angle with the river; the edge of the river is just about in this position—as I am indicating.

Q. But the road—there is a trifle of an angle here (indicating), but it is almost parallel there, is it not, with the river? Almost I say? A. No, I wouldn't say almost parallel but the edge of the river is about in this position (indicating).

107 Q. I see. Well can you tell us approximately what degree that curve is or can you tell the jury in such manner that we will understand just what type of a curve or corner that is—if it is such? A. It is as sharp a curve as is indicated by the map. It goes around—the center line is the arc of a circle of approximately sixty-eight (68) feet.

Q. What is the distance between points "D" and "E"? A. The width of the road at that point——

Mr. Fenton: Don't you have some notes about that? I think the witness should testify to measurements; not from the map.

By the Court:

108 Q. Is your plan there to scale? A. Oh yes.

The Court: That's all right; measure it then.

By Mr. Batton:

Q. What's the scale of this map? A. One-tenth of an inch to a foot.

Q. Then what is the distance please between points "D" and "E"? A. Well, to scale, fifteen and one-half (15½) feet.

Q. Then it is 15½ feet across the road of the traveled highway between points "D" and "E"? A. That's right.

Q. Now what percentage is that grade from point "A" down to "C" speaking in standards of steepness? A. It's a 9% grade approximately. 109

Q. It's approximately a 9% grade? A. Yes.

Q. And have you driven back and forth on this road, going in and out of the bridge? A. Yes.

Q. What would you say, in your opinion, as to the type of curve—that is—to make myself more clear—is that an ordinary curve or a dangerous curve, or a mediocre curve or what?

Mr. Fenton: I object. It isn't for the witness to characterize it. He can describe what the degree of curvature is. 110

Q. I withdraw that and ask the witness to describe the type of curve, that is, please? A. Well it is a sharper curve than any other on this road. It's an unusually sharp curve, and as you see (indicating) it's almost an angle that you make as you drive into the bridge. This part (indicating) is an unusually sharp curve and you have to make quite an angle to get into the bridge.

Mr. Batton: At this time I would like to move to have Plaintiff's 1 admitted in connection with the witness' testimony.

The Court: Yes, it is admitted. 111

Q. I show you Plaintiff's 3, Mr. Chase—this is a painted photograph—and ask you if you recognize it?

The Court: No, is it a good likeness of the bridge?

Q. Is it a good likeness of the Williams River bridge? A. Yes, I should say so.

Q. Does it show the approach to the bridge from the south?

112 Mr. Ryan: We object to that—this isn't a picture but it looks as though it was an old print and they may have changed the road.

The Court: They may have done a lot of things but I will admit that.

Mr. Ryan: May we have an exception?

The Court: Yes.

Q. I can straighten that out. Is this a good likeness of the bridge and the road as it exists today? A. Yes sir.

The Court: At the time of the accident——

113 Mr. Batton: Well, he's never seen the bridge at the time of the accident, Your Honor.

The Court: All right.

Q. Now Mr. Chase, you stated a while back that you had driven back and forth over that road a number of times. Having driven back and forth across this particular road and entered that bridge, what would you say in your opinion would be a safe speed to round that curve and drive into that bridge?

Mr. Ryan: I object to that as a conclusion of the witness and entirely immaterial.

The Court: I think that is for the jury to decide. I

114 think that would be invading their province.

Mr. Batton: I submit here is a man that has driven back and forth through the bridge, and I submit he is perfectly competent to give us his opinion as to what would be the safe speed to enter that bridge.

The Court: I think he's competent to give a speed but whether that speed is safe or reckless is for the jury to decide instead of persons who have driven it.

Mr. Batton: We will waive that.

Q. What is the type of the roadbed there, Mr. Chase?

A. The type of roadbed?

115

Q. Yes, please? A. Well, it is an earth and gravel road.

(Mr. Batton hands photographs to reporter to mark.)

The Court: Mark them all as exhibits, Mrs. Gardner, to save time. (Photos marked Pltfs. Ex. 3 to 18, inclusive.) Have you a memorandum on each picture telling what it is?

Mr. Batton: Well, yes sir, there is a——

The Court: Don't show them one by one. Give him all the pictures and ask him if they're good likenesses.

116

Q. Explain what those pictures——

The Court: No, are those good likenesses of what they show?

Q. Did you take these pictures at my direction? A. Yes.

Q. When were they taken? A. Yesterday morning.

Q. Yesterday morning? A. Yes sir.

Q. Are those pictures taken of the Williams river bridge from the Williams river bridge and the road on either side of it?. A. Yes.

Q. Then they're likenesses of the bridge and the road at the point where I directed you to take the pictures? A. That's right.

117

Q. Now will you please describe to the jury what each picture represents?

The Court: No, doesn't it show for itself with the memorandum?

Mr. Batton: Except for the fact, Your Honor, that I don't believe the jury knows which is the north and south end of the bridge.

The Court: They would if they read the memorandum, wouldn't they?

118 *By the Court:*

Q. Did you put on the memorandum, Mr. Chase? A. Yes.

Q. Well are your memorandums accurate? A. I think so.

Mr. Batton: Then there isn't any need for any further comment on the pictures.

The Court: I shouldn't think so.

Mr. Batton: So at this time I will offer them in evidence.

119 The Court: Yes, admitted (Pltfs. Ex. 3-18.)

Q. Now I have here Pltfs. Exhibits 4, 5, 6, 7 and 8. Did you take those pictures? A. Yes.

Q. At my direction? A. That's right.

Q. When? A. Yesterday morning.

Q. Are they a likeness of the bridge and the road leading there? A. Yes.

Mr. Fenton: At the time of the accident you mean?

Mr. Batton: No sir, they were taken yesterday.

Mr. Fenton: Unless they're a likeness of the place at the time of the accident, we object to them.

The Court: He said while you were out he was going

120 to show that by another witness.

Q. What do these pictures represent, Mr. Chase?

The Court: Well, do they represent what the memorandum says?

Mr. Batton: If the Court please, in this instance I have had Mr. Chase at my direction place his car on the road to show in certain instances that there was sufficient room for two cars to pass safely.

Mr. Fenton: Now if the Court please we object to this performance. What Mr. Batton has done with his

car hasn't much to do with this accident. His conclusion from someone else—is hearsay as to where this thing, or that thing or the other thing was cannot be used in evidence against Mr. O'Brien.

The Court: Will you put in evidence showing that the cars at the time of the accident were located as they are in this picture? Will you put them where they were, accurately, illustrating as they were at the time of the accident? It might be helpful.

Mr. Batton: In this instance Your Honor, Pltfs. Ex. 4 shows an automobile coming out——

The Court: Will you put in evidence showing that the automobile in the picture accurately illustrates the position of the car or cars at the time of the accident?

Mr. Batton: I will put in evidence—testimony to show that the car that came out of the bridge, came out in the same manner as the picture shows in Pltfs. Ex. 6.

The Court: All right, I will admit that.

Mr. Fenton: We object to it and desire to have an exception if these photographs are admitted.

The Court: All right.

Mr. Batton: These represent—Pltfs. 6, 4 and 8. I have withdrawn Pltfs. Ex. 5 and 7 because I cannot prove that by any testimony.

The Court: All right, I will admit them—Pltfs. Exs. 6, 4 and 8.

(RECESS AT 2:50.)

Q. Referring again to the map, will you please show us what the deflection angle of the road is from the south end of the bridge, going south? A. You mean how much it is or what it means?

Q. How much it is and what it means? A. As you drive off this bridge on the road—by the time you have gotten up to such a position as this (indicating), your car will have turned through a certain angle—in this case approximately 60 degrees——

124 Mr. Fenton: Wait a minute! If the Court please, we object to this, as to what a car will have done. It isn't a question of what some car may have done. It is what happened on this occasion.

Mr. Batton: If the Court please, in this particular instance, if the automobile comes through the bridge and follows the road, every car has got to turn in this particular angle.

The Court: The jury can see that just as well as anybody can explain it to them.

Does the map show the degree?

Mr. Batton: No sir, and that is what we wish to show —the shaprness of this curve.

125 The Court: All right.

A. (continued) ——I am simply telling you what the map shows. That is the angle that a car would turn. It is shown graphically to you—what I am trying to explain.

By Mr. Fenton:

Q. In other words, it shows it better than you can explain? A. Yes.

Mr. Fenton: That's what I thought.

By Mr. Batton:

126 Q. The right angle is how many degrees? A. 90 degrees.

Q. Is this solid—bridge, this black spot—pointing to the south end of the bridge? A. Yes.

Q. Now a car driving on this road, driving through the bridge, and arriving in this position—would there be a blind spot for instance in looking up in this direction (indicating)? A. Well in looking in this direction there will be that much of an obstruction in their view; not the full length of it you understand but whatever length there is across his line of sight.

127

Q. In taking that into consideration who, in your opinion, would have a better line of vision, the person coming out of the bridge going south, or a person coming north and entering into the bridge?

Mr. Fenton: We object to the question. It is not a matter of opinion from this witness. That is not matter for expert testimony.

The Court: I think I will allow that—who could see better?

Mr. Fenton: Save the exception.

A. Well, whichever party is nearer to this obstruction will have the poorer vision. That is, the obstruction obstructs your view more if it's close to you than if it's far away from you, so whichever party was looking at the other past this obstruction from the greatest distance would have the best view. 128

Q. To illustrate that more fully, for the benefit of the jury, if I should hold this card a matter of four inches or five inches from my face and looking at you, would you have a better view of me than I would have of you? Is that what you mean? A. Yes, the nearer the obstruction is to your view, the wider angle of vision it obstructs.

Q. I see. By the way, along this point here (indicating) where the post and the railing is, at this time is it clear or is there a lot of shrubbery growing up there? 129

Mr. Fenton: Just a minute! I think that should be limited to the time of the accident—not this time.

Mr. Batton: He cannot answer——

Mr. Fenton: Then I would defer it until there was somebody that could.

Mr. Batton: Very well, I will waive that.

Q. Is there a rail fence immediately on the northerly side of the highway here (indicating)? A. Yes.

Q. That is extending from the southerly entrance of

130 the bridge? A. Yes, just as it is shown. This (indicating) is the north side of the road and this (indicating) is south.

Q. By what on the plan are the posts and railings represented? A. The posts are represented by these heavy dots and the railing by these black ruled lines.

Q. That is the same on this other side of the road? A. Yes.

Q. What is there on this map to represent north? A. That arrow there (indicating).

Q. At the top center of the page? A. Yes.

131 Mr. Batton: Now Mr. Fenton objected a moment ago to Pltfs. Ex. 6, 8 and 4 being admitted in evidence. I simply request that they be admitted in evidence in connection with this witness' testimony for the purpose only of showing the relationship of the width of the road to the width of the automobile.

The Court: Well I admitted them, didn't I?

Mr. Batton: I didn't know Your Honor whether you had admitted them or not.

The Court: I have admitted all you asked me to.

Mr. Fenton: I understood those were withdrawn.

Mr. Batton: No, these two here (indicating) were withdrawn.

The Court: If you will promise to show that that car was in the same place where the car in the accident

132 was, I will admit them.

Mr. Batton: I can show by the evidence that Mr. Wilson's automobile came out of the same place in relationship to the bridge and road as Pltfs. Ex. No. 4 shows.

Mr. Fenton: I object to No. 4 for that purpose because the photograph shows on its face that it does not show the relation of the car to the bridge. There's only part of the bridge in there and only part of the car, and where it is with respect to the side of the bridge, it is absolutely impossible to tell.

Mr. Batton: I requested they be admitted with

133

respect to the relation of the width of the car and width of the road.

The Court: I will admit it anyhow.

Mr. Fenton: Save our exception.

The Court: You are going to show it is the same size car, approximately the same by some other witness?

Mr. Batton: Yes sir.

Q. Opposite point "D" coming towards the river, how far does the embankment extend beyond the fence there?

Mr. Fenton: Which side?

134

Q. (continued) Opposite point "D" going in a northerly direction? A. Right here (indicating)?

Mr. Fenton: Which way?

Q. That would be to your left, Mr. Fenton? A. I should say about two feet.

Q. And at the end of that two feet, describe the premises there? A. I have only a vague recollection of that but I think that is a bank wall from there down.

Q. Do you mean a sheer drop? A. Well, I don't like to say; I am not sure.

135

Mr. Batton: That's all right.

Cross examination by Mr. Fenton:

Q. Mr. Chase, you spoke about a solid section of the side wall of the bridge cutting off the view of the one who is nearest to it more than it would one who was farther away from it. I suppose that depends something on the size of the section of the wall, doesn't it? A. No, I don't think so.

Q. That is, if you have a side wall of a bridge that is

136 solid, that is four times as long as an automobile, you think that would not shut off the view from somebody outside of the bridge, looking at it from the side? A. Why, taking this section——

Q. No, answer that. A. You will have to ask it again, please.

Mr. Fenton: Read it, please.

Q. repeated by reporter. A. Well, that would depend on the relative position of the cars.

Q. Well, assuming someone was approaching for instance down this hill that is marked "A" to "B," at an
137 angle say of about 60 degrees with the highway as it goes through the bridge—until they reach a certain point it would be impossible for them to see lengthwise through the bridge, wouldn't it? A. Yes.

Q. And if there were a solid wall on the northwest side of the bridge, they couldn't see through the wall to see what was in the bridge, could they? A. That's right.

Q. And so if the obstruction would be the size of the side wall of that bridge, it would be just as effective to cut off the sight of one approaching the bridge as it was of one who was inside the bridge, wouldn't it? A. Yes, that's true.

Q. Now I don't know whether you know whether or not the opening existed in the bridge as shown on Pltfs. 14
138 —in the wall of the bridge, at the time of this accident or not? Do you know? A. I don't know.

Q. Assuming that it was, will you tell me if that opening is covered by diagonal members of the side frame of the bridge? A. It is in part, yes.

Q. That is, there are planks coming down on an angle from the south toward the north, and planks coming down in the opposite direction, from the north toward the south, so as to make a network? A. Yes, that's right.

Q. That is ture all through the bridge? A. Yes.

Q. And it is true all through that opening, is it not? A. Yes.

139

Q. Just as it shows in the picture? A. That's right.

Q. With that condition existing—you have testified as an expert on vision—won't you tell me if it is not true that one coming through the bridge has a better vision, as they look off toward the right—toward that hill—than one has coming down the hill of vision into the bridge through that opening? A. Yes, that's true.

Q. So that although the hole is small, when he's near to it he can see through and get a wider range of vision? A. That's right.

Q. Well, when coming down and approaching the bridge with that kind of latticework in there, their vision would be practically shut off of any object passing through 140
the bridge, wouldn't it? A. I wouldn't say practically.

Q. Well, so completely that they wouldn't be apt to see it, would they? A. I couldn't say as to that.

Q. They would have to devote their entire attention to looking in through that opening, if they saw anything in the bridge, wouldn't they? A. Not necessarily.

Q. You think not. Now won't you tell me what the width of the planking is in that bridge? The planks are laid crosswise of the bridge, aren't they? A. Oh, the flooring?

Q. The flooring, yes sir? A. That's 12 feet 6—I am not sure but it's to scale on the map.

Q. That is your recollection, 12 feet 6. I don't think we will quarrel about that, and that is the width of the traveled part of that bridge throughout its entire length 141
from the north end until you get to within twelve feet of the south end, isn't it? A. I am not sure about that last twelve feet you mention.

Q. Well, is there a place—— A. It's shown correctly to scale on the map.

Q. Is there a place at the south opening of the bridge where there is a plank laid lengthwise at the northwest corner of the bridge? A. At the southwest, yes.

Q. At the southwest, yes; pardon me. By the way you took some notes when you made these measurements, did you? A. Yes.

142 Q. Have you got those notes with you? A. I only have some of them.

Q. Won't you refer to them and tell me if this place where you measured—where was it you got fifteen feet? A. I have no notes of that. This map was essentially drawn in the field.

Q. Well, you mean you drew it as you went along? A. Yes.

Q. Well, not in the form in which it is now? A. Well —yes.

Q. Do you want us to understand you had this sheet of paper out there in the road—on the highway—when you
143 were making these measurements and you drew those lines as you made measurements on them? A. I drew the map in pencil first on that paper, and then I took it to the site and checked it, and after checking it and putting in the pencil lines and making a few slight changes, then I inked it.

Q. You had to make some measurements before you could draw any lines, didn't you? A. Yes.

Q. Didn't you set the measurements down on something? A. Oh yes.

Q. On a field book? A. Yes.

Q. Have you got that book with you? A. Yes sir.

Q. Won't you tell us where you made measurements
144 with respect to the width of the road, on the south side of the road? A. I will have to show you on the map how it was done.

Q. I want to see your notes that you made about it at the time? A. All right, I have them right here.

Q. Now tell me where you made measurements? A. First, I set up the transit at a point at this edge of the road —right about here (indicating on map), ——

Q. That is the southeast edge? A. That's right— such that I could sight through the bridge and just take an arbitrary line to pass this point (indicating).

145

Q. I don't care for the detail of your survey. I am asking you for the point where you made measurements for the width of the road? A. That was a measurement made when I checked the map and no notes were made of that.

Q. Is that one made by Mr. Batton's suggestion? A. Yes.

Q. That is, he told you where he wanted to measure? A. No, he said to make such map as would accurately show the edges of the road.

Q. And you made one measurement for that purpose, did you? A. No, I made a good many.

Q. All right, that is what I asked you about. Where else did you make it? A. I don't recall now, but at a 146
sufficient number of places that in my judgment I could draw the edges of the traveled way in correctly.

Q. You know that the road at the south end of the bridge is just twelve feet six inches wide, don't you? A. No, I don't.

Q. Well it is only the width of the traveled part of the bridge, isn't it? A. Well, you mean this width here (indicating)?

Q. Yes sir? A. You would like to know what that is? A. No, I want to know if you have measured it? A. Oh yes.

Q. And you found the traveled highway at the south end of the bridge was twelve feet six inches wide, didn't you? A. Well, it's more than that by the width of this last plank. 147

Q. That is, you think by putting the plank in lengthwise just at the end of the bridge, it makes the highway just that much wider? A. Yes sir.

Q. So if you drove on that plank you would be sliding right along the side wall of the bridge, would you? A. I couldn't say.

Q. Isn't it a fact all the way through that bridge, except for that one plank, there is a substantial drop off from the ends of the plank to the floor of the bridge underneath the planks? A. Yes sir.

148 Q. That drop off is two inches, is it? A. I should say so—about.

Q. That is, they look to you like two inch plank, the plank on the bridge? A. That's right.

Q. Well you know that the condition is such that it is neither practical, nor feasible, for one driving through the bridge to put his wheels out into that trough, don't you? A. It isn't usually done.

Q. So that if one drove through the bridge on the traveled part of the bridge, and the part that was made for travel—it's twelve feet and six inches wide—that that is the width of it at the end of the bridge, isn't it? A. Not at
149 the end. All except the last end.

Q. If you include this plank that has been laid lengthwise, you get a little addition, do you? A. Yes.

Q. How much? A. It appears to be thirteen and one-half.

Q. That is, you get a total width of 13½ feet if you include that plank that has been laid down in there? A. That's right.

Q. What you have measured is the distance from one shoulder of the road to the edge of the other shoulder of the road, isn't it, and indicated it on your map? A. Yes.

Q. So that you show as the traveled part of the highway not only the part that is used for travel, but the entire extent of the shoulders on either side of it, don't you? A.
150 No, I wouldn't say so. Perhaps I answered that other question wrong there.

Q. Have it right. I don't want you to have it wrong. You have showed the road there from grass line to grass line, haven't you? A. I have shown the width of the road by these lines within which you wouldn't hesitate to drive, but you would ordinarily hesitate to drive so that your wheels would be beyond such a line as that (indicating).

Q. In other words, you have determined for yourself what you would call the traveled part of the highway? A. That's right.

151

Q. And shown what you think you wouldn't hesitate to drive over? A. That's right.

Q. What you have shown in the measurement you have given us is the entire width of the highway from grass line to grass line as shown in Defendant's A, have you not? A. I cannot tell you definitely whether the grass line is exactly where I took the edge of the traveled way, but it would be approximately so.

Q. Now do you happen to know whether or not about in the vicinity that I am pointing to, which is near the end of what you represent as a guard rail on the southeast end of the bridge—running from C to the end of what you represent as a guard rail—do you happen to know there is a spring located in there? A. No, I don't.

152

Q. Did you make a sufficient investigation to ascertain whether there is a spring in that immediate vicinity that discharges water down along the shoulder of that road? A. No.

Q. Do you know whether or not the edge of that road for some distance is very soft? A. It wasn't when I was there.

Q. When were you there? A. Yesterday.

Q. That was the first time you were there? A. No. I was there perhaps a month ago, when I made a final check of this.

Q. You never were there in 1936? A. No.

153

Q. And you know nothing about what conditions were in 1936, do you? A. No, I do not.

Q. Did you notice when you were there yesterday and a month ago, that as you approached the end of the bridge on the easterly or right hand side of one going north, and come along to the guard rail, that there is a very sharp break of the shoulder area from the road and inside the guard rail? A. You mean right here (indicating)?

Q. Yes? A. There is a break in grade. I wouldn't say that it was sharp.

Q. Well, I don't mean in grade. I will show you Defendant's A and call your attention to—— A. You are speaking of the grass section of the road?

154 *Transcript*

Q. Yes—— to the road in the vicinity of the third post counting from the right, and ask you if at some distance from the guard rail the shoulder does not break away quite sharply before it reaches the guard rail? A. I know that it does break away but I wouldn't say sharply.

Q. It breaks away sufficiently so you wouldn't undertake to drive close to that guard rail at that point, would you? A. That's right.

Q. And the shoulder of the road as you approach that point is of such a consistency that one driving into it would be very likely to lose control of his car, would he not, on his right wheel? A. I should say not.

155 Q. You think it's solid and hard there? A. It is now.

Q. But you don't know how it was in 1936? A. No.

Q. Now did you make any surveys northerly of the north end of that bridge? A. No, I didn't go beyond here (indicating).

Q. Did you travel over the highway at all? A. Yes.

Q. Does it continue to be a much narrower highway than it is just before it enters into the bridge?

Mr. Batton: I have no objection to Mr. Fenton asking him whatever questions he wishes regarding the place where the accident occurred, but you are getting the width of the bridge and a great deal further from
156 the other side, which has nothing to do with the point of impact at all. It is entirely foreign.

Mr. Fenton: It's quite material to the happening of the accident.

The Court: You are speaking now of the other end of the bridge?

Mr. Fenton: Yes.

The Court: How is it important?

Mr. Fenton: Because this is a two car accident, if the Court please; cars going in opposite directions and if they claim anything for this part of the survey, we have a right to show what conditions are, in cross

examination, for a reasonable distance either side of it.

The Court: You are speaking now beyond the bridge, at the other end?

Mr. Fenton: Yes, north of the bridge.

The Court: If you think that is important, you put it in. Is this a long or short bridge?

Q. What is the length of it, Mr. Chase? A. 115 feet.

Mr. Batton: Now I would like to renew my objection. I have no objection to his getting it in, but 115 feet before getting to the point of impact seems to me 158
a reasonable distance to be taken in, and beyond that seems——

The Court: I will let him show it.

Q. repeated by reporter.

The Court: He doesn't know probably, Mr. Fenton, about this in '36.

Q. Well, as you saw it yesterday or day before? A. The road becomes narrower as you go north from the north end of the bridge.

Mr. Batton: If he is competent to testify as to the 159
condition of the road today, I submit he is competent to testify as to whether or not there's any brush along the guard rail at the south end of the bridge on the westerly side of the road, which was the question I asked a while back and was omitted.

The Court: All right.

Q. A little distance—short distance—northerly of the north end of the bridge is there a railroad track? A. Yes.

Q. Will you tell me if there's an underpass there? A. Yes.

160 *Transcript*

Q. Did you make a measurement of the width of the underpass? A. No.

Q. I show you Defendant's B and ask you if that correctly represents it as you saw it? A. Yes.

Q. I show you Defendant's C. and ask you if that presents a correct picture that one gets north of the underpass, at a point north of the underpass and looking back toward the north end of the bridge?

Mr. Barber: If the Court please, I submit this is not cross examination.

The Court: I know, but Mr. Barber——

161 Mr. Barber: My point is if he wants to take the testimony and make him his own witness, I am not objecting.

Mr. Fenton: I am not offering it as my testimony. I think it is cross examination. If the Court thinks it is not proper, I will suspend, of course.

The Court: No, I said go on.

A. I think it is.

Redirect examination by Mr. Batton:

162 Q. Now at the time that you made this map in 1939 were there any bushes on the westerly side of the road from the southern end of the bridge to the end of the guard rail?

Mr. Fenton: To that we object.

The Court: I think I should admit that. You have asked him all about the width of the road.

Mr. Fenton: I will withdraw my objection.

Q. repeated by reporter. A. Only very low bushes.

Q. Can you get a clear, unobstructed vision from point A to the entrance of the bridge now?

Mr. Fenton: I object to that.

The Court: You asked him about views there. I think I should allow this now. 163

Mr. Fenton: I haven't asked him about anything of this kind. This question was permitted, as I understand it—the one before this—because I asked him about the width of the highway north of the bridge at this time. Now as I understand it, the Court permitted him then to testify as to whether there was any brush at the south of the bridge at this time.

The Court: Bushes he said.

Mr. Fenton. That isn't this question. Exception.

The Court: Brush as I understand it is loose. You can show if there's any bushes. Bushes signify they're something growing—is that right? 164

Mr. Batton: Yes, as I understand it.

Q. repeated by reporter. A. I cannot answer that question offhand.

Q. Well, how far up——

The Court: Mr. Batton, you are going to have a witness tell how it was at the time of this collision or accident?

Mr. Batton: Yes sir.

Mr. Batton: Well, Your Honor, I was trying to accommodate several witnesses that had to get back home, which is why my lineup isn't as it was previously, but I will waive that question, if the Court please, and I will ask just one other question here. 165

Q. Mr. Fenton brought out about the fact that a person in the bridge could see much better looking through this opening on the west side of the bridge, and much farther than a person coming down the road could see into the bridge, is that right? A. That would be true, yes.

Q. Now if there were a great number of bushes along the westerly side of the road at the end of the southerly

166 *Transcript*

end of the bridge, would a person's view from the inside of the bridge—that is view of the road from the inside of the bridge—be obstructed because of those bushes? A. That would depend on the height of the bushes.

Q. If they were high enough——

The Court: Of course, that would be self evident.

Mr. Batton: I just wanted to bring that out, Your Honor.

The Court: He may tell us.

A. The bushes growing in the position you indicate, if
167 sufficiently high and thick, could, of course, obstruct vision.

Mr. Batton: That is all.

MRS. MYRA ABBOTT called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Batton:

Q. Will you state your name, please? A. Myra Abbott.

Q. And where do you live, Mrs. Abbott? A. Rockingham.

Q. Are you acquainted with the plaintiff in this case, Margaret Conway? A. Just slightly.

168 Q. When did you first meet Miss Conway? A. The day that she was hurt at the end of the bridge.

Q. On what road do you live? A. I live on the Rockingham-Springfield road—the upper—the hill road.

Q. Is that the same road on which the Williams River bridge is located? A. Yes.

Q. How far do you live from the southerly entrance of the bridge, approximately? A. Oh, a stone's throw, or a little over. I wouldn't estimate in feet.

Q. Would it be closer to say three and one-fourth yards? She says she doesn't know about feet. A. Approximately.

The Court: Isn't that well enough—a stone's throw? We all know what that is. 169

Q. Do you live right on top of the hill? A. Yes.

Q. Now as you just testified, this road—the Rockingham road—on which you live, does that go over the hill and down under the underpass which Mr. Fenton mentioned, and through the bridge? A. We live at the top of the hill and it goes down through the underpass and around.

Q. I show you Plaintiff's Exhibit 3 and ask you what that is? 170

By the Court:

Q. No, is that a good picture of the place there? A. Why, I think so; I painted it.

Mr. Fenton: I think we will all agree that it is an excellent picture.

By Mr. Batton:

Q. Do you know where this accident took place? A. Yes.

Q. That was at the southerly end of the Williams River bridge? A. Yes. 171

Q. Now can you see the scene of the accident from your house? A. No.

Q. Do you remember the day on which Miss Conway—Miss Margaret Conway was injured? A. I couldn't tell the date. It was in the fall—in August.

By the Court:

Q. Do you remember the occasion? A. Oh, I remember the occasion, yes.

172 *By Mr. Batton:*

Q. Where were you, or did you see Mr. Wilson, the driver of one of the cars, as he passed your house? A. Well, because of subsequent events I gathered that it was Mr. Wilson. I saw a car go down by just previous to the accident.

Q. Will you tell us where you were at the time you saw him?

Mr. Fenton: I object to that.

The Court: What do you care, where she was?

Mr. Fenton: That is purely a conclusion.

173 The Court: Is she going to testify she saw the collision?

Q. What color car was it you saw? A. I couldn't tell the color. I saw the top.

Q. Did you hear a horn blow a few minutes after this car passed your house? A. I heard a horn very shortly but it wasn't minutes. It was shorter than that.

Q. Will you tell us please why you remember the occasion of Miss Conway being injured? A. Because very shortly after this car went down, Mr. O'Brien came up and asked me if I could take someone to the hospital as he had had an accident down there and one of the girls was hurt,

174 and I took her to the hospital.

Q. Did he bring the girl up to the house? A. No.

Q. How did Mr. O'Brien get in touch with you? A. He came up to the house.

Q. Then you went down, took your car and you picked up this lady? A. Yes.

Q. Will you tell us please what you saw down there and just what you did with this girl? A. Well, I took my car as soon as Mr. O'Brien told me she was hurt and went down the hill and saw her standing at this little pitch, a little beyond the bridge with another girl, so I took the two of them and Miss Conway was badly hurt.

175

Q. Describe her, please? A. Well, she stood there with the other girl's arm around her. Of course, I saw the blood running badly, and I helped her into the car. She seemed rather numbed to me, as a result of the blow, as you would normally expect from such a blow. On the way down to the Falls she said that her neck and back hurt—the back of her head—and I stopped at a roadhouse for a glass of water to keep her from fainting, and drove on down with her to the hospital. She didn't faint away but she was beginning to be in quite a bit of pain before we got to the hospital; the numbness was wearing off.

Q. Did she complain at all about her head? A. Well, her head was badly gashed and that was beginning to ache. 176
I didn't see the gash.

Q. You didn't see it? A. I didn't—her hair covered it, and I didn't stop to examine it. I took her down to the doctor to do that.

Q. You said she was bleeding there? A. Yes, she was bleeding.

Q. How much? A. I don't know. He had a number of handkerchiefs soaked, and a white coat and a few other things.

Q. How about her clothing? A. Well, her dress was quite bloody. She lost quite a little blood. Not enough to be dangerous in any way, but she was bleeding very freely.

Q. Now you say you heard a horn seconds, or a little while after this car passed in front of the house? Do you 177
know whose horn that was? A. No, I don't.

Q. But this was just a few seconds or so after it passed your house? A. Yes.

Q. Did you call on Miss Conway to see her after she was at the hospital? A. Yes, I took her down some flowers one day.

Q. How long was that after the accident? A. I couldn't say. It must have been—I waited until I thought she was able to see people,—it must have been three or four days.

Q. Did she complain of any pains or ailments at that

178 time? A. She was very courageous, and said her head was pretty sore, and her neck ached and was stiff yet.

Q. Have you seen her since that day? A. I haven't seen her until today.

Q. Did any other car pass except that one that passed your house just before the accident? A. Not that I had seen. Not that subsequent events would make me remember. I remember this because of the accident immediately following.

Q. Can you tell us the approximate speed of that car that passed the house? A. Why no, it wasn't going fast enough so that it attracted undue attention, that's all.

179 Q. Where were you when you heard the horn?

The Court: What do you care about that?

Mr. Batton: Well I would like to show it's perfectly possible that Mrs. Abbott could hear the horn.

The Court: Suppose she did or didn't hear the horn? What do we care about that? This lady was living way beyond the other end of the bridge.

Mr. Batton: Yes sir, but I can show by testimony later that Mr. Wilson did blow his horn and that she heard the horn, and therefore, I can tie up the fact it was Wilson's car that passed her house.

The Court: He isn't going to deny it is his car that was in this collision?

180 Mr. Batton: No, but there might be some question as to whether it was Wilson's car.

The Court: Is there going to be any issue on that?

Mr. Fenton: I don't know; I haven't talked with Mr. Wilson. Mr. O'Brien isn't going to deny that his car was in the collision.

Q. Where were you when you heard the horn, Mrs. Abbott? A. I was in the front hall of the house—near the front door.

Q. That faces where? A. It faces the road going down to the bridge.

181

Cross examination by Mr. Fenton:

Q. As a matter of fact you didn't see the car at all? A. I saw the top of the car going down to the bridge.

Q. As you saw the top of this car going by, as you looked out of the hall, you heard what you call a horn? A. Shortly afterward I heard a horn.

Q. Your house is northerly, of course, of the underpass? A. Yes.

Q. And a considerable distance farther north of the underpass than the underpass is north of the end of the bridge, is it not? A. Well, the underpass is—would you call it north of the bridge as the road swings there?

182

Q. We have been calling it that—that your house was on the north side of the river? A. Yes. Our house is farther from the bridge than the underpass.

Q. And your house is farther from the underpass than the underpass is from the bridge, is it not? A. Yes.

Q. And as you come through the underpass and you come up around a curving hill, your house is a little over the crest of the hill, is it? A. Right on the crest.

Q. Right about at the crest, and that is quite a heavily wooded section through there, is it, on either side of the road? A. No, we have no wood or brushes on our side.

Q. No brush or trees either? Won't you tell me if this Defendant's C presents a view as you look toward the underpass going down the hill southerly of your house? A. Yes.

183

Q. And Defendant's B presents the view looking through the underpass and in the direction of the hill leading up to your house? A. Yes. There are the three elm trees (indicating) that are in the pasture on the right hand side going down.

Q. Then there are some on the other side? A. This (indicating) is quite a wide mowing—a place where the town dug out gravel.

Q. Is the railroad track on the embankment—that is higher than the road, so that the road goes underneath? A.

184 The road goes underneath the track but the slope is quite deep so the embankment doesn't come up on the road.

Q. It doesn't come up so high? A. No.

Q. Of course, you don't know whether that was Mr. Wilson's car you saw? A. Nothing only as we link events —circumstantial evidence.

Q. Would you say that your house was perhaps one-fourth mile from the end of the bridge? A. No, I shouldn't think so.

Q. You wouldn't think it was quite that much? A. No, I don't think it is quite that much.

185 Q. But you cannot even see the bridge from your house? A. Oh no. There is a sharp—where our barns are built on the plateau on a level with the house—that plateau comes out to the corner of the road—corners on the road and hides the view down to the bridge.

Redirect examination by Mr. Batton:

Q. You are quite familiar with that road? A. Why yes.

Q. Do you drive over it a great number of times each year? A. Yes.

Q. You drive your own car? A. Yes.

Q. What would you say as to the type of curve that 186 there is there leading into the bridge coming from a southerly and going into a northerly direction there?

Mr. Fenton: I object to that.

Q. waived.

Q. I show you Plaintiff's Exhibit No. 10 and ask you if that is a picture of the entrance into the bridge from the southerly side? A. Yes.

Q. As it looks today? A. Yes.

Q. Do you remember how it looked along this railing —pointing to westerly railing—in August 1936? A. Well I

187

know that after that accident they cut a lot of brush along there—bushes.

Q. And were there any small trees that grew up there?

By the Court:

Q. That were cut? A. Oh yes, they cut them.

By Mr. Batton:

188

Q. This was following the accident? A. These trees grew further down. You see it is a very steep bank. This does not show the bank on the left as I was going into the bridge, and there was quite a lot of small trees—white birches, etc.

Q. Now if you remember, did those trees obscure your vision? A. Yes, they did.

Q. Or obscure the vision of a person driving down the road for the purpose of entering the bridge? A. Certainly they did.

(Testimony of Rev. Geo. E. Currier and Dr. Trask.)

(Wednesday, August 2, 1939, 9:30 A. M.)

189

MISS MARGARET CONWAY, the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Batton:

Q. Will you state your name, please? A. Margaret Conway.

Q. Where do you live? A. Walpole, New Hampshire.

Q. How old are you? A. Thirty-six (36).

Q. Are you employed anywhere at the present time? A. No sir.

190 Q. Sometime in August 1936 were you involved in an automobile accident? A. Yes sir.

Q. Who was the driver of the car in which you were riding? A. George H. O'Brien, my brother-in-law.

Q. How did you come to be riding in Mr. O'Brien's car on that date? A. He came to my home and asked me to go to his home to dinner.

Q. You say he came to your home; where was your home at that time? A. North Walpole, New Hampshire.

Q. He came to North Walpole, New Hampshire after you? A. Yes sir.

Q. And go ahead please. Did he ask you—— A.
191 He asked me to go to his home to dinner. I didn't want to go and he insisted that I go; I finally consented to go. We were driving on the road in Rockingham, Vermont—which was on a hill—there is a sharp curve on this hill.——

Q. Was that sharp curve——

The Court: Let her go on and tell.

A. Miss Mary Walker was riding on the front seat with Mr. O'Brien, and Anna Walker was riding in the rear with me. As we turned this—there is a sharp curve with a steep hill—as we turned on this hill Mr. O'Brien cut in on the left——

Q. Go on. A. He cut in on the left and I heard him
192 say "Oh God!" and he grabbed the wheel—he yanked the wheel to the right. I saw this car coming out of the bridge and I think I shrieked.

Q. Go on. A. The cars crashed. The impact threw me forward and it cut open my scalp six inches, leaving it bare to the skull. I stepped out of the car and I stood on the road. I didn't know that my head—my neck was bothering—it was my neck seemed to bother me; I didn't have any feeling in my head.

Q. Go on. A. I didn't know that my head was cut until Mr. Wilson said "you are cut" and George started to run through the bridge crying to get somebody to take me

193

to the hospital. I have a recollection of Mrs. Abbott taking me to the hospital. My clothes were saturated with blood; even into my shoes.

Q. Do you remember going to the hospital? A. Yes, I have a recollection of Mrs. Abbott taking me to the hospital.

Q. Do you remember arriving there? A. Yes sir.

Q. Do you remember being taken into the operating room? A. Yes sir.

Q. And do you remember when Dr. Shaw came in to see you? A. Yes sir.

Q. Now let's go back for a moment. You say that you came down this steep hill, leading into the Williams 194
River bridge would that be? A. Yes sir.

Q. Now what kind of a road was that—dirt—gravel—pavement? A. Oh, a dirt road.

Q. Had you been over that road a good number of times? A. Have I?

Q. Had you up to that time? A. No sir.

Q. How many times would you say you had been over the road,—ten or twelve? A. Oh no; perhaps three times.

Q. Do you remember the condition of the brush on the left hand side of the road—whether or not there was a tall grove of trees and brush and bushes leading along the bank on the left hand side of the road there? A. Yes sir, there was.

195

Q. Coming down the road could you see the entrance to the bridge? By that I mean when you were seventy or eighty feet up the road—before entering the bridge—was it possible to see the entrance of the bridge from where you were at that time? A. I don't know what you mean.

Q. I show you Plaintiff's Exhibit No. 3 and ask you if you recognize—is that a fair presentation of the Williams River bridge and a part of the highway leading into the southerly entrance of the bridge? A. Yes sir.

Q. Now at the time that you drove down this road with Mr. O'Brien in 1936—August 1936—was there at that

196 time a number of tall brush and trees and growth growing up along this guard rail and extending up on this (indicating), the northerly side of the road for a long distance? A. Yes sir, there was.

Q. Now if you went a matter of 100 feet or more up from the curve, would it be possible for you or the driver of an automobile to see the entrance of this bridge with all this undergrowth obstructing the view? A. No sir.

Q. Now when in your opinion would you first be able to see the entrance to the bridge?

Mr. Fenton: I object to the question. It isn't a
197 subject matter for opinion and she has so little familiarity——

The Court: No, you may ask where she could see but I don't think she could give her opinion. She can estimate the distance.

Mr. Batton: I don't think she could answer that question in estimation, so I will withdraw it.

The Court: Isn't the engineer the man to testify about that?

Mr. Batton: Yes sir, that is why I am waiving.

Q. Now you say there were two other young women in the car with you? A. Yes sir.

Q. Who was sitting with Mr. O'Brien, if anyone, on
198 the front seat of the car? A: Mary Walker.

Q. You were sitting on the back seat? A. Yes sir.

Q. On what side of the back seat? A. I was sitting on the right hand side.

Q. Was anyone sitting next to you? A. Yes, Anna Walker.

Q. Now just tell us when you first saw this car of Mr. Wilson's and approximately how far you were from the entrance to the bridge when you first saw his car? A. Well, when Mr. O'Brien came around this curve he cut in on the left and that was the first I saw of the car, and he said "Oh God!"

199

Q. Then what did he do? A. He said "Oh God!" and he yanked the wheel to try to get over on to the right.

Q. Now where was Mr. Wilson, on which side of the road, and where was he if you remember? A. Mr. Wilson's car was coming out of the bridge and he was on the right hand side.

Q. That is, he was on his right hand side? A. Yes.

Q. Of the road? A. Yes.

Q. Do you remember how far over on his right, or would you say he was just on his side of the highway? A. Oh, Mr. Wilson was away over. George pushed him into the fence.

200

Mr. Fenton: May the last be stricken out?

The Court: No, I will leave that in, Mr. Fenton.

Q. Well perhaps to make this clear. How far was Mr. Wilson from the guard rail on the northerly side of the road, if you know, as he came out of the bridge, or did you notice? A. As I saw—as I should say—the car coming out of the bridge, he was way over on his own side, Mr. Wilson was. I should say just as closely over as he could get.

Q. Do you know how hard the cars came together?

Mr. Fenton: Well I don't quite see how this witness could answer this question.

The Court: Well I think she might.

201

Q. To explain that, was it a gentle shock or a good hard crash? A. Oh no, it was an awful crash.

Q. Have you any idea, Miss Conway, of the speed which Mr. O'Brien's car was going? A. No, I haven't. I have never driven a car.

Q. You don't drive an automobile? A. No sir.

Q. Well, did he seem to be going pretty fast?

Mr. Fenton: I object to the question.

Mr. Batton: Question waived.

202 The Court: Yes. I think in that railroad case, Mr. Fenton, the Court said a witness might be allowed to say it was going very fast or very slow. Horace Graham was the witness. I will allow it.

Q. repeated by reporter.

Mr. Fenton: Exception.

Q. Well, if you remember now at what rate of speed —if you know?

203 The Court: No, she says she cannot say but you may ask her whether going fast or slow?

Q. All right, Miss Conway? A. Well, I really didn't notice. I wasn't paying any attention.

Q. You were not paying any attention to how fast he was going? A. No.

Q. All right. On coming down the steep hill and just before entering the curve that goes directly into the bridge, where was he driving?

The Court: How far away is that from the place of collision?

Mr. Batton: Well that would be within 125 feet or 150 feet.

204 The Court: I would leave that out then.

Mr. Batton: Well I would suggest, Your Honor, that it's material in this respect: As he comes down the hill and cuts to the left, would he be driving in the center of the highway or to the right or the left of the highway? I think it would have a tendency to show whether a man was using a slight degree or a great degree of care in entering the dangerous intersection or dangerous bridge. That is the reason for which I asked it.

The Court: All right, in view that this has to be gross negligence, how long a distance he was driving on his wrong side of the road, I think I will allow that.

205

Mr. Fenton: If the Court please, the witness has indicated he was driving until he got into this curve—as he came into the curve, he cut the curve. The evidence shows the curve is right up to the bridge.

The Court: I will let her show how long a distance he was driving on his wrong side, it being necessary to establish gross negligence here. Whether it was on this side inadvertently, or for a jiffy, or whether he had been driving quite a long distance on his wrong side.

Mr. Fenton: I agree with Your Honor's view that that would be material, but the witness has apparently put him on his side until he got to the curve. He couldn't cut the curve if he was on the wrong side of the road. 206

Mr. Batton: The testimony so far is that as he rounded the curve into the bridge he cut the corner. Now he might have been on the left and still cut the highway, or on his right or center of the highway, and still cut it.

Mr. Fenton: He couldn't be on the left and cut because that is the place was claimed he cut too.

Mr. Batton: I waive it.

The Court: She may tell how long a distance he was driving on what was his wrong side of the road.

Q. Where was Mr. O'Brien driving, if you know, as he came down the hill and just before entering the curve? Now by that question I mean was he driving on his own side of the road, the center, or the left of the highway? 207

The Court: Now please withdraw that question.

Mr. Batton: All right, I will strike the last part of it and ask where was he driving when he approached the bridge?

The Court: No, withdraw it all. The idea is, ask her how long a distance he was driving on his wrong side?

Mr. Batton: Very well, Your Honor.

208 Q. For how long a distance was Mr. O'Brien driving on the wrong side of the highway? A. Well I don't know. I cannot say that because when he came around this curve to go down this steep hill, instead of staying on the right, he went way up on his left.

By the Court:

Q. Is that the first time he went over on his left, when he came to the curve? A. Well, yes sir, as he came around this curve he swung way over to the left.

209 Mr. Fenton: That is what I understood her testimony before, Your Honor.

By Mr. Batton:

Q. How far was Wilson's car from you when you first saw it? A. Well really I cannot judge distance.

Q. Well was it the length of this courtroom? A. Oh yes.

Q. Just about that far, or farther, or closer? A. You mean to the door of the courtroom?

By the Court:

210 Q. Yes, from where you are, across the room? A. Yes, I should judge so.

By Mr. Batton:

Q. Just about the length of this courtroom as you turned the corner and first saw him? A. Yes sir.

The Court: We measured this one day. Is there anyone here that remembers it? Is it 40 feet or thereabouts.

Mr. Fenton: 25 I should say.

The Court: We will have it measured. I am going to predict it's more than 25. What do you say?

Mr. Batton: I will say 30 feet.

Mr. Fenton: About 30.

The Court: I guess it's more than 30 feet. Well General Barber, what do you say?

Mr. Barber: I would say about 30; 25 or 30.

Q. Now at the time that you got out of the car you say that you had no pain at all in your head? A. No, it was all in the back of my neck, and my finger—my thumb.

Q. Your thumb had been injured? A. Yes, because I grabbed on to the crank that was on the side of the car. When George said "Oh God!" I saw this car and I think I shrieked and I grabbed on to this crank in the side of the car.

Q. Do you know what your head hit? A. No, I don't.

Q. Do you know whether anything was said after you got out of the car except when Mr. Wilson said "Margaret, you are hurt—you are bleeding"; do you remember whether anything at all was said? A. No, I don't, only that George started to cry.

Q. After he started to cry, he went through the bridge to get Mrs. Abbott? A. He said "I must get somebody to take you to the hospital. I will go and see if I can get Mrs. Abbott," and he ran through the bridge crying.

Q. Before had he exhibited any other signs of nervousness there? A. He seemed to be very, very nervous.

Q. Seemed to be very upset when the accident happened? A. Yes.

Q. How long were you in the hospital? A. Twelve days.

Q. Did you suffer any pain or inconvenience following Dr. Shaw's taking care of this wound? A. Yes, my head ached all the time. I was dizzy and my neck bothered me. I had to have hot water bags at the back of my neck all the time I was in the hospital.

Q. That was because of the pain in your neck? A. Because of the pain in my neck.

Q. How long would these headaches last while you were in the hospital? A. Oh, I had them every day.

Q. How long would these headaches last while you were in the hospital? A. I had them all the time.

Q. Where was the ache, in the front of your head, or back, or where? A. Well, it's right in the back of my head, and it throbs.

Q. How about your shoulders and arm, do you have any ache there? A. Oh yes, my shoulders and my arm, and the pain goes down my left arm and into my fingers.
215 When I wake up in the morning I have to grab my arm and the pain is down in my fingers. Well, it acts like rheumatism to me.

Q. At the time that this accident occurred, for whom were you working? A. Mr. McLennan.

Q. Mr. McLennan—where did he live, in Bellows Falls? A. Yes sir.

Q. How long had you worked for Mr. McLennan? A. Three years.

Q. Three years? You worked for him for how long before this accident occurred? A. From January 6 to August 27.

Q. January 1935 to—— A. January of 1936 to August 1936.

216 Q. Oh, I see. Following the time that you left the hospital you returned back to Mr. McLennan's house? A. Yes sir.

Q. Were you able immediately upon returning to Mr. McLennan's house to resume your duties? A. No sir, I had to go to bed.

Q. What was your position at Mr. McLennan's home? A. Well, I was the housekeeper.

Q. Well what were your duties as housekeeper? A. Oh, I did all the cooking and I planned all the meals, and I was running the house for Mr. McLennan and his daughter.

Q. In other words you took complete charge of his household? A. Yes sir.

Q. Is it a large house? A. Yes sir, a very large house.
Q. Now after going back home, were you in bed? A. Yes sir.
Q. For how long? A. For two weeks.
Q. For two weeks? A. Yes sir.

The Court: And in the hospital for twelve days, was it?

Mr. Batton: Twelve days in the hospital and two weeks on returning home.

Q. Did Mr. McLennan have someone else come in to help or to do the work at that time? A. Yes sir, he did. He had a woman take complete charge. 218
Q. How long was she there? A. She was there two weeks.
Q. That was while you were in bed? A. Yes sir.
Q. And then after you got out of bed —— A. Oh, after I got out of bed, too, she was there.
Q. How long was she there after you got out of bed? A. I should say she was there two weeks after I got out of bed.
Q. In other words she was there for a month? A. Yes.
Q. Helping you do your work? A. Yes sir.
Q. After you got up? A. Yes sir. I was sitting around but I wasn't doing anything.
Q. Now before this accident what was the general condition of your health, Margaret? A. Oh, my health was excellent: I was never sick. 219
Q. You were able to do all your work without any help? A. Oh, yes sir.
Q. You were able to take care of the entire household and do all the cooking, clean the house and do all your work? A. Yes sir, it was never too hard for me.
Q. Did you ever have any nervous disorders? A. No sir.
Q. No troubles of any sort? A. No sir.

220 Q. In other words your health was splendid up to that time? A. Yes sir.

Q. Now Margaret, following this accident in August 1936, will you tell us what the condition of your health has been—following the accident? A. Following the accident?

Q. Yes, please? A. I have headaches all the time up the back of my neck, and they throb. I have the sensation of falling all the time I have to grab on to something, and when I am standing at the sink washing dishes, I am going down and down into darkness. I have to grab on to something. My head seems to swell way up and then it grows small again, and I feel my body is growing small.

221 Q. Do you have any trouble with your eyes since the accident? A. Sometimes I see double.

Q. Are you able to go to movies at all? A. No, I haven't enjoyed the movies since my accident.

Q. Did you go to the movies prior to this accident? A. Why yes, I used to go twice a week.

Q. How many times have you been to the movies since the accident? A. I should say three or four times.

Q. In the last three years? A. Yes sir.

Q. What are the sensations you get on going to motion pictures today? A. Well, I see double and my head seems to bother me. I have funny sensations in my head and my head seems to be too heavy for my shoulders, and my head drops over to the left side. It always seems to be more

222 comfortable that way.

Q. Does that apply just to the time you are attending movies, or does that apply to any other time? A. No, the same tendency when I ride in the car. When I ride in the car I am floating; I feel just as if I was floating.

Q. Do you mean just floating in the air? A. I just feel as if I am floating, yes sir.

Q. Do you get any sensations at all when the car stops? A. Yes, I have the same sensation. I feel I am floating and I feel I am going right out of that car.

Q. Did you suffer any sensation of the same kind which you now describe, before this accident? A. No sir.

223

Q. Can you ride in a car with any comfort today? A. No sir, it upsets me—makes me nervous to ride in a car. One time I went to Boston on the bus; I went twice in fact, with my sister. The bus ride down made me so nervous and I felt so sick I had to go back to my room and I couldn't accomplish my errands. My sister did her shopping while I returned to my room.

Q. How about this pain in the back of your neck of which you speak. What is that like? A. Oh, it's kind of a dull ache; it throbs all the time. It lasts anywhere—sometimes from three days, and I have had it last a week.

Q. How often do these pains recur? A. Well, sometimes I have them—three times a week I have had them.

224

Q. How about your headaches of which you speak—how often do you have those? A. That is just what I meant, that I had them——

Q. You were describing—— A. My headaches.

Q. At that time? A. Yes.

Q. I see. Do you have any sensations at all—any peculiar sensations or nausea sensations on going to bed or getting up? A. Oh yes, I do. When I lay down in bed and put my head on the pillow, the bed is going round and round and I seem to be swirling all the time, and it seems to take me a little while before my head will settle down. It's an awfully funny sensation.

Q. By the way, Miss Conway, do you drink? A. Oh, no sir.

225

Q. Do you have any sensations at all in climbing up or down stairs? A. When I go upstairs and when I go downstairs I have the sensation that I am falling and I have to grab on to the railing or on the wall. I always have that sensation going down stairs; I feel as if I am pitching forward, and when I am going up I am falling.

Q. Did you have any of these sensations before this accident? A. No sir.

Q. And you have described the sensations that you have—you feel you are falling backwards and forward and sideways—have you ever fallen? A. Only once.

226

Q. Only once? A. Yes.

Q. Would you say that was directly due to this feeling—queer feeling which you have? A. Well, I don't know—anybody might fall.

Q. It might have been and it might not? A. Yes.

Q. Now this description that you gave us of sinking down when you were washing dishes, or something like that. Describe more fully what you mean there, please, Margaret? A. When I am standing—if I am standing washing dishes, or sometimes when I am sitting on the chair—when I am standing at the sink doing the dishes I have this feeling come in my head that I am going down and

227 down; the floor is opening up and I am going down and down in the darkness, and I have to grab on the sink or wherever I am. Sometimes that happens when I am sitting on a chair and I get up; everything grows black and when I bend over to make a bed, or things like that, the same thing occurs. It doesn't last very long.

Q. Do you have any inconvenience today when you attend the hairdresser's which you did not suffer formerly? A. Oh yes, I cannot have heat applied to my head because I suffer terribly from it afterwards. I don't like to have anybody—it bothers me to have anybody touch my head.

Q. By the way, did Dr. Shaw have any X-rays taken of your head, or neck at the time he took care of you and attended you, if you know? A. Yes, I think that he did.

228 Q. You think that he did? A. I think he did.

Q. You are not sure of that? A. Dr. Liston took an X-ray.

Q. Dr. Liston took an X-ray? A. Yes.

Q. Did you go to Dr. Liston because of your own free will? I mean because you wanted to go there to have him treat you, yourself? A. No, Dr. Liston sent word for me to come to his office, that he wanted to see me. He isn't my doctor.

Q. He isn't your doctor? A. Oh no.

Q. Did you ever have X-rays taken at the advice of Mr. Barber or myself? A. Yes sir.

229

Q. Those X-rays turned out negative, did they not? A. Yes, I had some taken down to the Memorial Hospital and those were negative.

Q. That was in Brattleboro? A. Yes.

Q. They were negative? A. Yes.

Q. You have never had any other X-rays taken beside those except the ones Dr. Liston took, is that correct? A. Yes sir. They told me Dr. Shaw took X-rays.

Q. If that is what you understand, that is all right. A. Yes, they told me that he did, because I was on the operating table over three hours. They told me so.

Q. How many stitches were taken in your head, if you know?

230

Mr. Fenton: That would be purely hearsay.

Q. waived.

Q. What kind of cut did you receive, if you know, Margaret?

Mr. Fenton: I object to this matter that can be described by the physician. Obviously this witness cannot know what kind of cut she had on the back of her head.

The Court: She said she had a cut six inches long. Can she do any better than that?

Mr. Batton: I don't think so.

231

A. I had to have my hair all cut off

By the Court:

Q. You can tell about that? A. On the left hand side of my head.

Q. Tell about it? A. Oh they say all this hair—they took all the hair off the left hand side of my head and I was baldheaded on the left hand side, and I had to wear a cap for months.

By Mr. Batton:

Q. Now following the time when you went back to work alone, how did you feel, Margaret? A. Oh, I felt very weak. I used to always wonder if I ever would feel strong again. The work seemed hard—everything seemed hard to me. I didn't feel that I could go on, but after this woman that was helping me left, I had my sister come and help me.

Q. How often did your sister come over? A. Oh, she used to come over every week.

Q. She came over every week? A. Yes sir.

Q. Do you mean by that, would she come over for the whole week, or a couple days, or a few hours, or what? A. What do you mean?

Q. Well, you said you had your sister come over every week. You don't mean we should infer she came over and stayed with you? A. No, Mr. McLennan used to go away Tuesday and was gone until Friday, and she used to come and stay with me while he was away. She always used to come and help me with the work.

Q. That was after you had got back to work following the accident? A. Yes.

Q. Did you have her over there for any other reason? A. Yes, I did because I wanted her to sleep with me; I was afraid; I used to wake up at night and I thought I was going through the accident again. I was afraid to be alone at night.

Q. Did you ever have anyone there to sleep with you before the accident? A. No sir.

Q. Did your sister ever come over to help you with your work before the accident? A. Oh no; I was too independent to have that. I didn't mind doing the work. The work never was hard for me to do.

Q. What did your sister do when she came to help you following the accident? A. Oh, she used to dust and hang out the clothes and help make the beds, and she used to iron the clothes for me.

235

Q. She come over whenever Mr. McLennan went out of town? A. Yes sir. I didn't start doing my work—when I started to work, it was on a smaller scale than I had usually done——

Q. You did less work following the accident than you did before? A. Yes, I did less. I didn't go into some of the rooms.

Q. What did you earn while working for Mr. McLennan? A. Twenty dollars ($20.00) a week.

By Mr. Fenton:

Q. A week? A. Yes sir. 236

Q. And your board and room? A. Yes sir.

By Mr. Batton:

Q. I think you stated a while back that you are not working now? A. No, I haven't worked for four months.

Q. You have been offered a job within the past six or eight months? A. Yes sir, Dr. Liston wanted me to go to work for him.

Q. Did you take it? A. No sir, I didn't feel that I could handle it.

Q. He wanted you to go to work helping in the house there? A. Yes sir.

Q. Do you feel that you could take a job now and be as competent or do as you did before? A. No sir, I don't. 237

Q. And you attribute that to what? A. To the accident that I sustained on August 27, 1936.

Q. Well do you attribute that to your condition today? A. Oh yes, to—my headaches. I have to go and lie down and they bother me. I have to take pills all the time. Sometimes it will relieve the pain a little but it doesn't take it completely away.

Q. What do you do around your house today? A. Just do the dishes and sit around.

Q. You do the dishes and sit around? A. Yes.

238 Q. You don't do any of the housework? A. No, not much.

Q. Do you do any of the cooking? A. No sir. Sometimes I get a little something for myself; sometimes I cook a little something for myself.

Q. Oh, I see. Did you have anyone dependent upon you beside yourself? A. What do you mean?

Q. For support? A. Oh yes, my father and my sister.

Q. Is your father unable to work? A. Yes, my father is seventy-seven (77) and he's crippled.

Q. Is your sister able to work? A. No sir, she's crippled also.

239 Q. That is, when you say "crippled," she has a hand

The Court: Well now, how is that admissible?

Mr. Fenton: I don't know, Your Honor, but I thought I would keep still.

The Court: As to Dad and her sister?

Mr. Batton: Well, I was just simply showing there that since she has been incapacitated that it's been quite detrimental to herself and her family both who have depended upon her for their support.

The Court: Suppose she had a hundred depending upon her for support? Suppose she didn't have anyone depending on her? Wouldn't her damages be just the

240 same?

Mr. Batton: Yes. I will waive that Your Honor.

The Court: I think you should ask her whether she got as much pay when she went back to work as she did before.

Mr. Batton: Very well.

Q. Was your salary the same after you returned from the hospital to Mr. McLennan's? A. Yes sir.

Q. Now Mr. McLennan had a daughter living at home? A. Yes sir.

Q. And she was married recently? A. Yes sir.

241

Q. About sometime in April or May, along in there? A. April the 9th; yes, April the 9th she was married.

Q. She closed up the house at that time? A. Yes sir.

Q. Then you left her employment? A. Yes.

Q. And following the accident this daughter of Mr. McLennan's was around home most of the time, or a great deal of the time? A. Oh, she was with me a great deal of the time; she was with me from the time I went there to work up to the time of the accident, until she went away to school in October.

Q. She came home while at school? A. She used to come back home weekends and for vacations, three weeks at a time.

242

Q. Now are you subject to feelings of depression a great deal now? A. Oh yes sir.

Q. Margaret, do you feel that you are now able to return to work and be as efficient as you were before the accident? A. No sir.

Q. What do you feel that your services might be worth now, or are worth now, if you should return to work as a housekeeper or maid or something to that effect?

Mr. Fenton: I object to the question.

Mr. Batton: I submit that she certainly——

The Court: You can ask her how much she could do now in comparison with before her injuries?

243

Mr. Batton: Very well.

Q. How much do you feel you can do now in comparison with what you did in the past before the injury? A. Oh, I should say about half of what I did before.

By the Court:

Q. How do you account— why did Mr. McLennan pay you as much after you were injured as he did before? A. Why did he pay me as much?

244 *Transcript*

Q. Yes? A. Out of sympathy, I guess, for me, because he knew I had to take care of my father and he knew I had dependents on me.

Mr. Fenton: I move to strike that out.
The Court: No, I will let that stand.
Mr. Fenton: Save the exception.

Q. After he died, what were your services for the daughter—what price? A. The price?

Q. Yes? A. She continued to pay me just as her father had done.

245 Q. Wasn't twenty dollars a week a pretty high price? A. Not for what I was doing. I was the housekeeper there. I was running the whole house and taking care of it and assuming all the responsibility.

Q. Yes, but—— A. He could go away and I was there with his home.

Q. How old was the daughter? A. Oh, twenty-two (22).

Q. That is, when? A. When she was twenty-two?

Q. Yes? A. Last March.

Q. Then she would be about twenty—in her nineteenth year when the accident happened? A. About that, yes sir.

246 *By Mr. Batton:*

Q. How many rooms were there in the house, Margaret? A. I think ten rooms—they're very large rooms.

Q. It was a two story house? A. Yes sir, but there is an attic there, too.

Q. How was the house furnished? A. Very nicely furnished.

Q. I mean there was a lot of furniture there to take care of? A. Oh no, not too much.

Q. Just a nicely furnished house.

247

By the Court:

Q. Did you ever get $20.00 a week prior to working for Mr. McLennan? A. No, I worked for Mrs.—for Judge and Mrs. Graham and they paid me $12.00 a week but I didn't have the responsibility that I had at Mr. McLennan's house. Mrs. Graham did half the work—or she helped me with the work.

By Mr. Batton:

Q. At Mrs. Graham's you just acted as a helper and a maid? A. Yes.

248

Q. And before that, or following the time you worked for Mrs. Graham, did you work for Mrs. Fred Babbitt? A. Yes.

Q. How much did she pay you a week? A. Ten dollars a week.

Q. How many in her family? A. Just herself.

Q. What did you do there? A. I just did the cooking for her alone.

Q. You did the cooking? A. Yes.

Q. Did she plan the meals and take care of the house, or did you? A. No, that's all I did, just the cooking. I never left the kitchen.

By the Court:

249

Q. Did she have other help? A. Yes, she had a woman came in to dust once a week. I never did any of that at all.

By Mr. Batton:

Q. You stated that blood ran down all over your clothes. Did it ruin the clothes you had on at the time of the accident? A. Yes sir, it did.

Q. What was the suit of clothes which you had on

250 that day? A. Well I had a hand knitted suit that I valued at $25.00. I never saw it again. I never wanted to.

Q. And what was your hospital bill? A. How much did I pay at the hospital?

Q. Yes?

The Court: If you have a memorandum there, ask her the amount?

A. I think my hospital was $63.00.

The Court: Is that right?

251 Mr. Batton: Yes sir.

The Court: Go through the bills and name the amounts to her. Don't show them to her.

Q. Here's one dated September 10, 1936 $63.02, is that right? A. Yes sir.

The Court: For what?

Mr. Batton: For services rendered at the hospital.

Q. Here's another one for X-ray, $5.00, is that right? A. Yes sir.

Q. Here's one for nursing, Miss Ethel Kinney, $17.00, is that right? A. Yes sir.

252 Q. One for Dr. Christopher Shaw for attending you —Surgery and taking care of you, $60.00, is that right? A. Yes sir.

Q. And did you attend a Dr. Stewart? A. Oh no. Dr. Stewart gave me the anesthetic I believe.

Q. Oh yes, that's right here, $5.00, is that right? A. Yes sir.

Q. Do you remember how much you paid Dr. Trask for his services there?

The Court: That's the man testified yesterday?

Mr. Batton: Yes sir.

253

A. I believe it was between twenty-five and thirty dollars; I don't know exactly.

By the Court:

Q. Six treatments he said? A. Oh no, I had more than six visits.

Q. More than six? A. Oh yes sir.

Mr. Batton: According to the Doctor's testimony it was six, Your Honor.

The Court: I have remembered it accurately?

Mr. Batton: That's right, six, and he charges—we don't know what he charges; he isn't here. 254

The Court: Perhaps she does? Did he tell us what he charged?

Mr. Batton: No.

By the Court:

Q. How long were those treatments that he gave? A. Oh, I have them for two months.

Q. How long a time at a time? A. Oh, an hour.

By Mr. Batton:

Q. How long ago was it, in '37 or '38, or when, if you remember? A. That Dr. Trask treated me? 255

Mr. Fenton: A year ago.

The Court: He told us that.

Mr. Fenton: I think we can probably agree he usually charges $1.50 a treatment.

Witness: Oh no, he charges more than that.

By the Court:

Q. More than that? A. Oh yes.

256

By Mr. Batton:

Q. Did Mr. McLennan send you to some doctor in Boston? A. Yes, he took me to a doctor.

Q. Do you remember the name of that doctor? A. Yes sir, his name was Dr. Nathan Garrick.

Mr. Batton: That's all.

(RECESS AT 10:35 A. M.)

257 Mr. Batton: If the Court please, and counsel for the defense, before proceeding with the cross examination I should like very much to call Dr. Garrick, who has to get back to Boston.

The Court: You may. We will be glad to accommodate the doctor.

DR. NATHAN H. GARRICK called as a witness by the plaintiff, having been duly sworn, testified as follows:

* * * * * *

DR. CHRISTOPHER C. SHAW called as a witness by the plaintiff, having been duly sworn, testified as follows:

258 * * * * * * *

(WEDNESDAY, AUG. 2, 1939, 2 P.M.)

MRS. CORA W. REED called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Batton:

Q. You state your name, please? A. Cora W. Reed.

Q. Where do you live, Mrs. Reed? A. Bellows Falls.

Q. Are you in some sort of business there? A. Yes, I am.

259

Q. What business is that? A. Garage,—repair shop.

Q. Are you in business with someone? A. With my husband—in partnership.

Q. Do you keep his books? A. I keep the books.

Q. Do you remember an occasion in August 1936 when your husband had occasion to tow an automobile into your garage? A. I do.

By the Court:

From this bridge?

260

By Mr. Batton:

Q. Do you remember an occasion in August 1936 when your husband had occasion to tow an automobile from the Williams River bridge to your garage? A. I do.

Q. Whose automobile was that? A. George O'Brien.

Q. What kind of car was that? A. A '34 Ford Sedan.

Q. Are you sure that was not a '36 ? A. I may have been mistaken but I was thinking it was a '34.

Q. You would rather leave it because you are not sure? A. I haven't my data on it, but it was a Ford Sedan, I am sure of that.

Q. After this car was towed into the garage, or when the car was towed in the garage, were you present? A. I was.

261

The Court: Now come right to it, how much was that car injured?

Q. Was there conversation—did you overhear part of the conversation that took place between your husband and Mr. George O'Brien? A. I was present.

Q. What did you overhear? A. In the course of conversation Mr. Reed asked who caused the accident, and Mr. O'Brien said that he felt that they were both at fault.

262 Q. What damage was done, if any, to Mr. O'Brien's car? A. It was practically all the left front end—front wheel, front fender and front axle.

Q. How much did it cost, if you know, to have it repaired? A. Forty-four dollars and ninety-five cents ($44.95).

Mr. Batton: That is all.

Mr. Fenton: No cross examination.

Miss Margaret Conway, the plaintiff, recalled.

263 Mr. Batton: One further question——

Q. Before Mr. O'Brien rounded this curve, did you hear him blow his horn? A. No, I did not.

Mr. Batton: You may cross examine.

Cross examination by Mr. Fenton:

Q. I think you said, Miss Conway, that Mrs. O'Brien was your sister? A. Yes sir.

Q. And these young ladies who were with you that day, Mary and Anna Walker, were your nieces? A. Yes.

Q. Where do they live? A. London, Ontario.

264 Q. Were they visiting at your home in Walpole? A. Yes sir.

Q. How long had they been there? A. Let's see—oh, about ten days.

Q. Had they previously been up to your sister's to call on this present visit? A. Before this visit?

Q. I mean on their then visit at your home, had they before the day of the accident, been up to your sister's? A. Oh, no sir.

Q. Had there been some talk about their going up to your sister's to call and have dinner with Mr. and Mrs. O'Brien? A. Yes sir.

265

Q. That matter had been discussed for some days before that, had it? A. No sir.

Q. And for a day or two before that? A. No sir.

Q. Your sister and her husband had been down to your house to call on them while they were there? A. Yes sir.

Q. Well as you recall it, had there not been previously some talk about you and your two nieces all coming up to the O'Brien house for dinner?

Mr. Batton: Just a moment! Any talk that took place when this witness was present we don't object to, but giving a narrative or talk someone else had I think should be excluded. 266

Mr. Fenton: I am asking about talk in which she participated.

A. Yes.

Q. Perhaps I could refresh your recollection. Were your nieces very fond of corned beef and cabbage? A. I don't know about them being fond of corned beef and cabbage, but I was.

Q. You were? A. Yes.

Q. Hadn't there been some talk about Mrs. O'Brien preparing a dinner of corned beef and cabbage because of their or your liking for it, and having that for the dinner when you came up? A. No, I don't know as she was preparing it for me. 267

Q. You knew that is what they were going to have that day? A. Yes, because Mr.——

Q. That was because it had been talked about by someone in your presence? A. Yes.

Q. And Mr. O'Brien came to your house with his car as a part of carrying out that arrangement of you ladies going up to his home for dinner? A. Yes sir.

Q. As you drove along out of Walpole I suppose you crossed the bridge over into Bellows Falls? A. Yes sir.

Q. And then followed the main highway—Rutland highway—up until you turned off on the Rockingham-Springfield road? A. Yes sir.

Q. You were sitting in back with Miss Mary Walker, was it, or Anna? A. No, I was sitting with Anna Walker.

Q. In the back of the car? A. Yes.

Q. And your niece Mary was sitting in front with Mr. O'Brien? A. Yes sir.

Q. I suppose as you traveled along you girls were visiting more or less about matters of interest? A. No sir.

Q. Well, didn't you talk with each other at all on the trip? A. Well, not before coming to the scene of the
269 accident there was no talking.

Q. Wasn't there anything about any of the scenery or the views that attracted the attention of any of you on that drive? A. No sir, I wouldn't say so.

Q. Wasn't the matter of the Old Rockingham Meeting House a matter of enough importance so that you girls referred to it as you passed by it? A. Yes sir, but that was away down; further than the scene of the accident—this side.

Q. Well, the Rockingham Meeting House is on the main highway, isn't it? A. Yes, it's on the main highway.

Q. And before you turned off on to the Springfield road which you took? A. Yes.

Q. That's right, isn't it? A. Yes sir.

270 Q. Perhaps you didn't understand what I meant. I meant from the time you left your home in Walpole, after you all got into the car and started for Mr. O'Brien's, didn't you girls visit back and forth as you were riding along there? A. You mean before we came on to this road?

Q. Yes? A. No, there wasn't much talking on the dirt road, no sir; everybody was very quiet.

Q. I don't think you understand. The highway from Bellows Falls up to where the Springfield road turns off, isn't a dirt road, is it? As a matter of fact it's macadam most of the way, isn't it? A. Yes.

Q. That is the road I am talking about, from Bellows

271

Falls as you got up to just beyond Rockingham Meeting House—you did visit along up through there, didn't you? A. Oh yes sir.

Q. And then you come to this place where you turn to take the Springfield road, and then you come on to the dirt road? A. Yes sir.

Q. That's quite a narrow road, isn't it? A. Yes sir.

Q. As a matter of fact, as you observed it, going along there, and from your knowledge of it, there's only about one place in the road where a car can travel any way, isn't there? A. No, I wouldn't say so.

Q. Well this one place as you noticed where cars usually travel—where the wheel tracks had beaten down the road surface so that it's harder than it is elsewhere? A. No, I didn't notice that.

272

Q. Well didn't you notice that there was a regular place of travel along that road? A. Well, yes sir.

Q. And as Mr. O'Brien went along he was traveling in this regular place of travel, was he not? A. Yes sir.

Q. And that continued at least down to the point where you have told us this morning in the curve that he sort of cut across the curve? A. Yes, he turned way out to the left hand side of the road.

Q. Until that time he had traveled in the place that is usually traveled by automobiles? A. Well, I think so—I wasn't paying any attention.

Q. Well as a matter of fact there wouldn't be any other place to travel on that road? A. No sir.

273

Q. You paid no particular attention to his driving I don't suppose? A. No, I didn't.

Q. There was nothing about the way in which he drove up to that point that attracted your attention in the slightest degree? A. No sir.

Q. Up to that point, but as you stated, there came a time when he got into this curve, that he cut the corner or cut the curve as you described it? A. Yes, he turned way out to the left of the road.

Q. And almost immediately you saw Mr. Wilson's car

274 come through the bridge, did you not? A. Yes, when Mr. O'Brien said "Oh God!" and then I——

Q. In other words, that is what I want to clear up if I can so we will all understand it alike. As he turned to the left and Mr. Wilson's car came through the bridge and he said "Oh God!" and pulled to the right, it all happened almost simultaneously, did it? A. Well, it happened very shortly.

Q. In other words, it happened so quick you couldn't really differentiate time even in seconds between the things that occurred there, could you?

Mr. Batton: I don't necessarily object to this but
275 Mr. Fenton is telling the story and calling for yes or no answers.

The Court: He has a right to do that in cross examination, hasn't he?

Mr. Batton: I don't think he has the right to tell the story himself. He can ask questions and get answers.

The Court: I think he has on cross. What do you say about that, General?

Mr. Barber: I agree with the Court within certain limits.

The Court: I don't think there's any limit.

Q. repeated by reporter. A. No sir.

276 Q. It all happened almost instantly I gather from what you say? A. Yes, but he clutched the wheel and tried to turn.

Q. That is, he tried to turn to the right? A. Oh he didn't. He kept on the left hand side all the time.

Q. He tried to turn to the right but didn't have time to get there before the cars came together? A. I would say he did have time.

Q. Did you know the fender of his car rubbed against the guard rail on the right hand side so that it left a little paint mark on the guard rail. A. No, I don't know anything about those things.

277

Q. You, of course, after the accident were not in a condition to look around? A. No sir, I saw Mr. Wilson's car pushed up against the fence.

Q. Did you know wheel tracks of Mr. O'Brien's car showed in the soft gravel on the right hand shoulder of the road immediately after the accident? A. No sir.

Q. Well did you know that his car was right up parallel and next to the guard rail after the accident was over? A. No sir.

Q. Well were you there when his car was backed and moved on to the other side of the road so as to leave a passageway for Mrs. Abbot to come through? A. Yes sir.

278

Q. Now the back of Mr. Wilson's car after it came to a stop—after the accident—was within about five feet of the end of the bridge, wasn't it, as you noticed it? A. Well, I really wouldn't say.

Q. Well it was a short distance. I don't suppose you were in a condition to judge in feet then? You shook your head "No"? A. No, I wasn't in no condition.

Q. Were you able and did you observe that the back of Mr. Wilson's car—that is, the right rear wheel and fender—was in contact with the guard rail on his side of the road? A. I don't understand what you mean there?

Q. You understand what the right rear fender, or the whole of the car would be, assuming this little photograph to represent a car? A. Yes.

279

Q. I mean the right rear side of the car was in contact with the guard rail, was it not? A. Mr. Wilson's car?

Q. Yes, I am speaking of Mr. Wilson's? A. It was right into the fence.

Q. I mean fence when I say guard rail? A. Oh!

Q. And the front of the car was swung a little out into the road, was it not? A. Mr. Wilson's?

Q. Yes? A. No, I wouldn't say so.

Q. That is your present recollections would not agree with that statement? A. No sir.

Q. The first you saw, of course, of Mr. Wilson's car was as the front of it came out of the bridge? A. Yes sir.

280 Q. Were you present when some tests were made of the brakes on Mr. Wilson's car? A. No sir.

Q. You had gone with Mrs. Abbott at that time? A. Yes.

Q. Now I think it appears that you began working again about October 1st—you were out of the hospital September 8th according to the record and I think your testimony? A. Well I was in the hospital twelve days.

Q. Yes; that is, from August 27—four days in August and eight days in September, that would make the twelve days? A. Yes sir.

Q. Perhaps you heard Dr. Shaw testify that you were
281 discharged from the hospital on September 8th? A. No, I didn't; I wasn't in the courtroom.

Q. Well wouldn't that be about your recollection of it? A. I started to work a month after the accident.

Q. That was about the first of October? A. Yes sir.

Q. And you continued to work at Mr. McLennan's at the same rate of pay until after his death and after his daughter had finally closed up the house and left? A. Yes sir.

Q. So that you didn't stop work because of your accident, or your condition, but because the place was closed up? A. Yes.

Q. And there was no longer an opportunity to work there, that's right, isn't it? A. Yes sir.

282 Q. You spoke of the rate of pay that you received. That is not the going price in Bellows Falls generally for housework, is it? A. Yes sir.

Q. Do you know of any other places in Bellows Falls where they pay any such rate of wage as that? A. Yes sir, I do. I know where they pay them just for doing cooking alone $15.00 a week.

Q. Are there quite a number of wealthy families in Bellows Falls? A. Well, I wouldn't say there were quite a number but there are several. They pay high wages.

Q. As a matter of fact, Mr. McLennan was a man of some means? A. Yes sir.

283

Q. Had a nice home? A. Yes sir.

Q. Which you looked after and took charge of? A. Yes sir.

Q. And he was very generous with you in that respect and tried to be helpful in every way that he could? A. Yes sir.

Q. No one made any suggestion at any time on the day of this accident from the time you left your home in Walpole until Mr. O'Brien gave out the expression "Oh God!", about the way in which he drove his car? Nobody made any suggestion to him about it at all? A. No sir.

Q. And so far as you observed there wasn't any occasion for anybody to make any suggestion up to that 284
moment? A. No sir.

Q. And I think you said that Mr. O'Brien seemed to be very much distressed because of your injuries? A. Yes sir.

Q. I think you said he wept? A. Yes sir, he ran through the bridge crying.

Q. And after getting you out of the car he started just as fast as he could to get someone to get you to the hospital? A. Yes sir.

Q. And got Mrs. Abbott for that purpose? A. Yes sir.

Mr. Fenton: That is all.

285

Redirect examination by Mr. Batton:

Q. Just a few questions here. When were you actually invited over to the O'Brien's for this corned beef and cabbage dinner? A. The night before.

Q. The night before? A. Which was Wednesday night.

Q. And did you accept the invitation at that time? A. No sir, I did not.

Q. When did you next see Mr. O'Brien? A. He came to my home in North Walpole Thursday morning and he

said—I didn't wish to go and he said "Come on, Margaret" —"Come on, Margaret, we're going to have corned beef and cabbage."

Q. Did you tell him you had anything else to do? A. I said I didn't care to go that day; I didn't want to go that day,—I didn't feel like going.

Q. But you did decide to go? A. I felt I didn't want to go.

Q. Is the regular place of travel on this Rockingham road of which Mr. Fenton has been talking, is that in the center of the road, if you noticed? A. What do you mean?

Q. Well, Mr. Fenton brought out the fact that this
287 road approaching the curve, or the entire road itself is rather a narrow road? A. Yes sir.

Q. And he asked if Mr. O'Brien drove in the regular place of travel on this road and you answered that he did? A. Yes, he did.

Q. Now I am asking you if you remember or not whether the regular place of travel on that road is in the center of the highway? If you don't know, don't try to answer it, of course. If you do, why, all right. A. I can't seem to understand it.

Q. That is a very narrow road, isn't it, Miss Conway? A. Yes sir.

Q. How many times have you been over the road? A. Before the accident, about three or four times.

288 Q. About three or four times before the accident? A. Yes sir.

Q. Let's assume this paper represents the highway—— A. Yes?

Q. Let's make it smaller so it will be a small highway. When he drove down this highway was he driving over here on the road, (indicating) over here on the left, or was he driving down the center of the highway? A. No, he kept to the left.

Q. I am not talking about the scene of the accident now—we want to get this thing right. I am talking about the road itself before you got to the scene of the accident? A. Yes?

289

Q. As he came down this long dirt road, where was he traveling? A. Oh, he was traveling in the center of the road.

Q. Now is that where the regular course of travel is of which Mr. Fenton spoke? A. Yes sir, I believe so.

Q. All right. Is it a one lane road? A. Yes, but two cars can pass.

Q. But it is a one lane road? A. Yes sir.

Q. Now you say that after you had seen the Wilson car, that time enough elapsed for Mr. O'Brien to grab the wheel of his car and yank it to the right to try to avoid the collision? A. Yes sir.

Q. Now you know Mr. O'Brien pretty well, don't you? 290
A. Yes sir.

Q. Would you say that he is rather a nervous type of gentleman? A.

Mr. Fenton: Just a minute! That is wholly immaterial to the question.

The Court: Well I am inclined to think that is so, with a lay witness.

Mr. Batton: Well I am offering to show, Your Honor, that the fact that Mr. O'Brien jumped out of the car here—he didn't have to run up and get Mrs. Abbott himself—he was crying, and he was told by someone else to go up and get her. In other words, 291.
he didn't have any presence of mind when he got out the car.

The Court: If he was a nervous man and was grossly negligent, he is liable, and if he isn't a nervous man and was grossly negligent, he is liable.

Mr. Fenton: If there's any claim that any nervous condition of Mr. O'Brien's condition had anything to do with this accident, it hasn't been set up in this claim. It appears that the plaintiff was thoroughly conversant with it and therefore, she would assume any risk that went with that.

292 The Court: I don't think she would assume the risk even if she knew he was nervous.

Q. waived.

Q. Did you overhear anyone tell Mr. O'Brien to go up and get Mrs. Abbott?

Mr. Fenton: I object to the question—purely hearsay.

Mr. Batton: It is something she overheard.

Mr. Fenton: Yes, but I understand what you overhear is hearsay.

293 Q. Did someone else in your presence—— A. Mr. Wilson.

Mr. Fenton: I withdraw the objection as long as it's answered.

Mr. Batton: That is all.

RALPH A. WILSON called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. Barber:

Q. Mr. Wilson, what is your full name, for the record?

294 A. Ralph A. Wilson.

Q. How old are you? A. Forty (40).

Q. And married? A. I am.

Q. Have a family? A. I do.

Q. Where do you live? A. Well, at the present time I live in the town of Rockingham, and have three years.

Q. For the last three years? A. For the last three years.

Q. Where did you live before that, in what town? A. Grafton, Vermont.

Q. How long did you live there? A. Practically all my life.

295

Q. Was there a while that you were away? A. There was about two years.

Q. Where were you those two years? A. I was overseas with the 26th Division, 103d Machine Gun Battalion.

Q. In the World War? A. Yes sir, wounded July 21, 1918.

Q. And did you receive an Honorable Discharge from the Service? A. I have.

Q. Now what is that highway leading from Bellows Falls to Chester designated as, Route 103? A. 103, yes sir.

Q. And the road, it goes up to your place where you now live and turns off to the east, or to the right? A. To the right. 296

Q. And that leads past the point of this accident? A. It does.

Q. Up past Mrs. Abbott's place? A. It does.

Q. Past Mr. O'Brien's place? A. Yes sir.

Q. On to your place? A. Yes sir.

Q. What is the condition of the road as to being level or hilly from your place down to this bridge that is over the Williams river? A. Well, up and down.

Q. Steep? A. Some parts are steeper than others.

Q. Now were you involved in an automobile accident in August 27, 1936? A. I was.

Q. And who was the other party? A. Mr. George O'Brien. 297

Q. What make of car did you have? A. I had a '26 Dodge.

Q. When did you purchase that Dodge? A. Around in May.

Q. 1936? A. Yes.

Q. What sort of car did Mr. O'Brien have at the time of this accident? A. He had a V-8 Ford.

Q. Ford? A. Ford, I should say around——

Q. On this day, August 27, 1936, what time did you leave your home to go somewhere? A. Well, I should say it was around twenty minutes past eleven.

298 Q. You had come down from your home, down past the defendant's home, and past Mrs. Abbot's home? A. I did.

Q. And on through the covered bridge? A. I did.

Q. When you got down to Mrs. Abbott's place, what did you do by way of changing your gears, if anything? A. As I come down the hill, after I left Mrs. Abbott's, I was in second gear.

Q. Then you proceeded down the hill to the bridge? A. I did.

Q. Under the underpass? A. Yes.

Q. Now before you go into that bridge, do you remember whether the road is a little bit up grade as you go into
299 the bridge? That is, as you go into the bridge is it up grade? A. Going into the bridge?

Q. Yes, going into the bridge? A. No.

Q. Do you observe this is a likeness of that Williams River bridge (showing Pltfs. Ex. 3)? A. Yes.

Q. Is this road up grade to the bridge a little—at the north? A. Why, no.

Q. Is the road as it enters the bridge on the north, is it up grade, or is it down grade as it enters the bridge? In other words, is it level? A. It's practically level.

Q. All right, and after you go through the bridge what is the road, level or not? A. It goes up grade.

Q. Now as you drove into that bridge what did you
300 do? A. I blowed my horn.

Q. About at what point were you in the bridge when you blew your horn? A. Well, as I entered the bridge I blew my horn, and I should say I went through the bridge, and about five feet outside the bridge I blowed my horn again.

Q. At the other end of the bridge? A. Before I got out of the bridge.

Q. Before you got out of the bridge? A. Yes.

Q. You blew your horn? A. Yes.

Q. That's right? A. Yes sir.

301

Q. It's the latter answer you want to stand by? A. Yes sir.

Q. Now as you drove out of the bridge, what part of the road was your car on? A. On the right hand side.

Q. The northerly or southerly side?

The Court: Go on, right and left?

A. On the right hand side of the road.

Q. Is there a rail fence on your right as you go out of the bridge? A. There is.

Q. And how near to that rail fence was your car when you drove through the bridge and out of the bridge? A. 302
Yes sir, as I drove out of the bridge?

Q. Yes sir? A. Well, it was just as near as I could get to the rail without hitting it.

Q. Now as you drove out of the bridge, how far away from the bridge did the collision occur between your car and Mr. O'Brien's car? A. I should say ten feet.

Q. About ten feet? A. Yes sir.

Q. How far away was Mr. O'Brien's car from your car when you first saw Mr. O'Brien's car—the defendant's car? A. Well, about thirty (30) feet.

Q. Which side of the road on your side, that is on your right,—which side of the road was Mr. O'Brien on? A. He was on the left.

303

The Court: On his left?

Q. withdrawn.

Q. On which side of the road was Mr. O'Brien traveling when he came towards you? A. Coming towards me he was on his left hand side.

Q. Now what did you see Mr. O'Brien do? A. I see Mr. O'Brien pull sharp to the right.

Q. Yes, and how soon—did something happen after that? A. As I was coming through the bridge?

304 Q. Yes, go on and tell it in your own language? A. As I was coming down through the bridge and went through the bridge, and outside the bridge—I saw Mr. O'Brien—I was coming from down home—coming from home and I go down this hill in second. As I entered the bridge I blowed my horn.

Q. Now you were telling us just a second ago what you saw Mr. O'Brien do, that he pulled his car to the right? A. He did.

Q. Did something happen right after that? What happened after he pulled his car to the right? A. I slammed on my brake and slammed my foot on the brake and pulled
305 up my emergency brake.

Q. Did the two cars come together? A. I was practically stopped.

Q. All right, but what happened to Mr. O'Brien's car, did it hit yours or didn't it? A. It certainly did.

Q. Tell us how hard it hit? A. Well it hit me hard enough so that it put my left—I should say my right hind wheel through the rail.

Q. On your right? A. On my right.

Q. And how far did Mr. O'Brien's car go after it hit your car? Were the two cars locked together when they stopped or not? A. They were.

Q. What did you do after that? A. I got out of my car just as quick as I could.

306 Q. What did you do? A. I went over to Mr. O'Brien's car and asked if anyone was hurt? I looked at Margaret Conway—I cannot pronounce that word—I says to her "You are bleeding." I turned around to Mr. O'Brien and told him the best thing he could do was to go up and get Mrs. Abbott and take Margaret to the hospital.

Q. Now did Mrs. Abbott come there? A. She did.

Q. And took Miss Conway away? A. She did.

Q. Now was Mr. O'Brien's car moved as a result of anything? A. What? Mrs. Abbott came down to take Margaret to the hospital; my car stood exactly in that spot.

307

We had to move Mr. O'Brien's car in order for Mrs. Abbott to take Margaret to the hospital.

Q. Where did you move Mr. O'Brien's car to? A. Back.

Q. On which side of the road? A. On the left hand side of the road; on the right hand side as I am facing the car.

Q. That would be to the southerly side of the road you say you moved Mr. O'Brien's car? Which way did you take it? A. Backed it up.

Q. Backed it up the hill, to the right of that car or to the left of that car? A. I should say left. May be I don't understand—facing the car.

308

Q. Did you put Mr. O'Brien's car on the side of the river or on the other side of the road? A. On the side of the river next to the road.

Q. On the same side as your car? A. On the same side as my car.

Q. Now who moved the cars? A. Mr. Reed.

Q. The cars hand't been moved from the time of the accident until Mr. Reed came there and moved them? A. Yes sir.

Q. Who moved them? A. We moved Mr. O'Brien's car back.

Q. You did? A. I didn't. He did.

Q. Oh, Mr. O'Brien moved it back? A. Mr. O'Brien moved his car back so Mrs. Abbott could get by.

309

Q. How far did he move it? A. I should say he moved it five feet or more.

Q. Now as you were coming through the bridge, did you hear the horn of Mr. O'Brien's car blow? A. I did not.

Q. How loud a horn was your horn that you blew? A. Well, I wouldn't want to get too near it, it might push in your ear. I mean it's pretty loud.

Q. Very loud? A. A very loud horn.

Q. What was the condition of your brakes on your car? A. They were fair. If they wasn't I wouldn't have the car on the road.

310 Q. My associate says you haven't made it clear whether you moved Mr. O'Brien's car on to the same side of the road your car was on, or whether you moved it on the other side. Can you place it? A. Mr. O'Brien got in his car and backed his car up on the side of the road where mine was.

Q. Then where did Mrs. Abbott go? She went by on that side? A. Yes, so she could get by.

Q. At the point where this accident happened and along the road there is there room—sufficient space—for two cars to pass in the highway there if they use care? A. There is.

311 Q. What is the width of the road—the traveled part of the road at the point of the accident, where the collision occurred—how wide would you say? A. It's over twelve feet wide.

Q. What's the width of your car you were driving—the Dodge you were driving? A. Five feet some odd inches—I think two or three inches.

Q. A standard width car? A. Yes.

Q. What was the width of Mr. O'Brien's car? Is that standard width? A. I think—yes.

Q. At the time that your car was struck by the O'Brien car and pushed back into the guard rail, did it break the guard rail? A. It did.

Q. How far through did your wheel project or go
312 through the guard rail? A. Why, it went through the guard rail and if I had gone—it did go through the guard rail and if I had gone two inches more I would have gone down over a bank probably twenty-five foot or more.

Q. Into the river? A. Yes.

Q. Now at the time of this accident do you remember whether there were any bushes along this guard rail on your side of the road by the bridge? A. I do.

Q. Were there any bushes there? A. They were.

Q. How tall—how high? A. Oh, I should say as high as your head or higher.

Q. And would that obstruct your view up the road

313

as you are coming through the bridge? A. It would.

Q. And would it obstruct the view of Mr. O'Brien coming down the road towards the bridge? A. It would.

Q. Since that time the bushes and trees have been cut out there? A. They have.

Q. So that at the present time does it appear as it is shown in this photograph, Plaintiff's 3? A. Before the brush—

Q. Yes, this is after the accident—that is the way it appears now? A. Yes, but before the accident there was brush here and here (indicating).

Q. On both sides of the road? A. Both sides.

Q. I think you stated this but was your car in second speed all the way while you were passing through the bridge? A. It was.

314

Q. Now when you were coming down the hill past the O'Brien's place and past Mrs. Abbott's place, do you always drive your car down in second gear? A. Yes sir.

Q. That has always been your practice? A. Yes sir.

Q. And how positive are you that you blew the horn twice while you entered the bridge at the time of this accident—on the date of this accident? A. Yes sir.

Q. How sure are you? A. I am very positive, surely.

Cross examination by Mr. Fenton:

315

Q. You say this was a 1926 Dodge car that you were driving? A. I did.

Q. You had had it since May? A. Yes sir.

Q. Well as a matter of fact you know that for some time at least before this accident your brakes had not been in good condition, don't you? A. I do not.

Q. You saw them tested right there at the time of the accident, didn't you? A. I did not.

Q. You saw the man who tested them push the foot brake right to the floor of the car without the brakes taking hold with any effect, didn't you? A. I did not.

316 Q. Weren't you present when your brakes were tested? A. I was not.

Q. Where were you? A. Now I cannot say as to that.

Q. How long did you stay there at the scene of the accident? A. I stayed there I should say an hour or an hour and a half.

Q. You saw Mr. Harry Reed there, didn't you? A. I did.

Q. And talked with him there, didn't you? A. Why, I asked him about my car—about getting my car out of the road.

317 Q. You saw him test your brakes, didn't you? A. I did not.

Q. Weren't you present when he tested them? A. I was not.

Q. You talked with him about how the accident happened right there, did you not? A. No, I did not.

Mr. Barber: I submit to the Court that is not cross examination.

The Court: I don't follow that rule General Barber.

Mr. Barber: I suppose they have a right to make him their own witness.

Mr. Fenton: This is cross examination without any question, Your Honor.

318 The Court: They don't make him their own witness.

Q. Didn't you say to Mr. Reed right there at the scene of the accident—while your car was right there—that your brakes weren't any good? A. I did not.

Q. And didn't you see him try the brakes himself and find that the brake pedal went right to the floor? A. I did not.

Q. And didn't you say to Mr. Reed right there that you couldn't stop your car when you came through the bridge, or that in substance? A. I did not.

319

Q. And that you were at fault for the accident? A. I did not.

Q. Or that in substance? Did you tell him anything of the kind? A. No sir.

Q. Was there some reason why you attempted to use your emergency brake rather than your foot brake? A. I always use them when I stop—my foot brake and the emergency brake.

Q. That is you use both of them when you stop? A. I do.

Q. That you always did with that car that you were driving that day? A. Any car.

Q. And did you do it with that car because you knew 320
you couldn't stop with one alone—that is, by using one brake you knew you couldn't stop the car?. A. I always put my foot on the pedal and bring up my emergency brake on any car.

Q. As a matter of fact the reason you were in second speed coming down the hill was because it was steep and you couldn't hold that car back with your brakes? A. I always drive down that hill in second, always.

Q. Is it because you couldn't hold your car back with the brakes that you had? I will put it this way so you will understand it, Mr. Wilson; isn't it a fact you went into second gear coming down that hill because you couldn't hold your car back with the brakes you had on it? A. No, it wasn't.

321

Q. Now this bridge—you know how wide the bridge is? A. I have never measured the bridge.

Q. Well do you know the planking over which you drive doesn't extend to the sides of the bridge? A. Yes.

Q. So that there is a space on either end of the planks, between the planks and the bridge that is lower than the planking? A. Yes sir.

Q. You know do you now that the planking isn't wide enough so that two cars could safely meet and pass on the planking, don't you? A. Well there has been two cars meet in that bridge, on these planks you are speaking of.

322 Q. Was that a usual or an unusual thing? A. Well, it was usual.

Q. Unusual? A. Usual.

Q. The cars would have to be in low gear, wouldn't they, and just barely be moving in order to keep on the planking and not collide with each other when they met? A. I should say that you have quite a little space—well, say six inches after—or when two cars meet.

Q. Six inches between the cars? A. Yes, I do.

Q. And how close would the wheels be—the outside of the cars, to the edge of the planking? A. Oh, I should say three inches.

323 Q. Well, if your cars are within six inches of each other and the wheels within three inches of dropping off the level there which they're traveling, the cars would have to be going pretty slow and guided pretty straight not to come into collision, wouldn't they? A. You couldn't go down that hill forty miles an hour.

Q. Not at the rate you were going you couldn't have gone into that bridge and met anybody, could you, and pass them? A. I should say I wasn't going fast.

Q. As a matter of fact you were going better than thirty-five miles an hour, weren't you? A. No sir.

Q. You say you were not? A. I was not.

Q. Now the only place in that whole bridge where there isn't a space between the planking and the side wall
324 of the bridge is just at the south end of it, isn't it? A. Yes sir.

Q. When you came out of that bridge and struck Mr. O'Brien's car, the force of the collision threw the back of your car right into the guard rail, didn't it?

Mr. Barber: I object to that because it is not quoting the evidence accurately.

The Court: He has a right to ask him in cross, hasn't he?

Mr. Barber: I don't think he has a right to misquote the evidence.

325

Mr. Fenton: No, the question does not misquote it.

The Court: If it does, he can ask him in cross examination.

Mr. Barber: I didn't think it was permissible to misquote.

The Court: He has a right to put the question any way he wants it.

Mr. Fenton: In view of the suggestion of brother Barber I want it cleared up. Because Mr. Barber in his question, put into his own question when O'Brien's car struck this, doesn't make it the witness' testimony.

The Court: Well, if it were, you have the right to ask the question differently than the evidence thus far appears to be.

326

Mr. Fenton: I understand it.

The Court: That's all right.

Q. repeated by reporter. A. When Mr. O'Brien hit car it throwed me back.

Q. Your car did not hit Mr. O'Brien's car at all, did s that what you mean? A. No.

Q. That isn't what you mean, is it? When you came of the bridge and struck Mr. O'Brien's car, the force of collision threw the back of your car right into the guard didn't it?

The Court: Well, that's rather a common expression —he hit me—I didn't hit him; he ran into me—I didn't run into him.

327

Mr. Fenton: We will see about it.

Q. The damage to your car was directly in the front, our car, wasn't it? A. No.

Q. Where was it? A. On the left hand side.

Q. On the left hand corner of your car? A. The mud-rd and the wheel.

Q. The mudguard and the wheel? A. And the wheel.

Q. Which wheel? A. My left wheel.

328 Q. Which left wheel, front or back? A. Front.

Q. Left front wheel? A. Yes.

Q. Well, the damage to Mr. O'Brien's car was on the left front mudguard and the left front wheel, wasn't it? A. Yes.

Q. And Mr. O'Brien's car was headed in the direction toward the right when the collision between the cars took place, wasn't it? A. It was.

Q. So the two corners of the cars came together, isn't that right? A. Yes.

Q. As you came out of the bridge, and we will call this
329 picture that happens to be marked on the back "Pltfs. Ex. 8" your car coming out of the bridge and Mr. O'Brien's car coming around the curve; the two front left corners of each car came together, didn't they, and in about the position that those cards are in (indicating)? A. Not quite, no.

Q. Won't you come down and put them in the position in which you say they were? Now you understand that this card that is marked "Pltfs. Ex. 9" is Mr. O'Brien's car? A. Yes.

Q. And this card marked "Pltfs. Ex. 8" is your car? A. I do.

Q. So that the front of your car struck right into the left front corner of Mr. O'Brien's car, did it, as you put it, is that right? A. No sir.

330 Q. repeated by reporter.

Q. Do you understand the question? A. I do not, no.

Q. repeated by reporter.

Q. The way you have got these two papers here? A. That's true; the way these two papers are now, yes sir.

Q. Well as you have got these two papers here now, the front of your car struck the left front corner of Mr. O'Brien's car. That's the way you have got them here, isn't it? A. I don't understand—about my car hitting his car.

331

By the Court:

Q. He hit your car? A. He hit my car.

By Mr. Fenton:

Q. All right, the left front corner of his car hit the front end of your car, did it? A. Yes sir.

Q. Now your car swung right into the rail, with the back end into the rail, and broke off the lower rail, isn't that right? A. It was pushed back through the rail.

Q. Well, it was just the back end of it that swung around, wasn't it? A. It might have been swung around 332
an inch and a half.

Q. The front end of it stuck out into the road, didn't it? A. Not way out in the road, no.

Q. Wasn't the front end of your car a considerable distance further from the guard rail than the back end of it was? A. The front end of the car might have been six inches from the guard rail.

Q. Is that all, as you now remember it? Is that right? A. Right.

Q. Now Mr. O'Brien's car was way over parallel with the guard rail and practically touching it, on the other side of the road, after the accident, wasn't it? A. No.

Q. You made a report to the Motor Vehicle Department, didn't you, of this accident? A. I did. 333

Q. You undertook to show on that report the position these cars were in, didn't you? A. I didn't make out the report, no.

Q. Did you undertake to make a report that did show the position the cars were in? A. I did the best I could.

Q. I show you paper marked Defendant's D and ask you if that is the report, or a copy of it, that was made for you? A. That's a copy.

Q. And that handwriting and those things on there were made by your wife, weren't they, in your presence, according to your directions? You were right there when

that was made out and after your wife wrote it you signed it, didn't you? A. It's my wife's writing, yes sir.

Q. That is your signature in your own handwriting at the bottom, isn't it? A. Yes.

Q. You told your wife how to make that diagram on there, didn't you? A. I believe I did.

Q. And you undertook to have it represent the facts as you then understood them, did you not? A. I did.

Q. That was your purpose in making the report to the Commissioner of Motor Vehicles, to represent as accurately as you could, and as truthfully as you could the things that are shown on that report and that diagram, that's right, isn't it? A. Yes.

Q. Now the diagram was made according to your direction, wasn't it? A. Yes.

Q. And the reason why you yourself did not do the actual writing and the actual drawing is because you have some difficulty in writing? A. Yes.

Q. Now on your diagram you have Mr. O'Brien's car right touching the guard rail, front and back, don't you? A. Yes, on that diagram.

Q. And on this diagram you have your own car with the rear on the guard rail and the front out a little ways from it, don't you? A. Yes.

Q. And that is the way that the thing happened, as you had it in mind on the 28th day of August, 1936, isn't it? A. Yes.

Q. And that is the way you have got it in mind now, isn't it, when you come to think of it and refresh your recollection? A. Yes.

Mr. Fenton: I offer this now. (Deft's. D).

The Court: Now that, gentlemen, isn't evidence against the plaintiff. It's merely evidence as bearing upon the accuracy of the testimony—to contradict the testimony that this witness has given, and for that purpose it may be received. To contradict—explain or modify.

337

Mr. Fenton: No, because he says now that was the way it was in his mind then and is now.

The Court: It does not modify his testimony. He modifies it.

Mr. Fenton: That is correct. I offer it for that purpose, in connection with his testimony.

The Court: Admitted. (Deft's. Ex. D.)

Redirect examination by Mr. Barber:

Q. Mr. Wilson, do you happen to remember personally now so you can now tell us, who drew that paper that was shown you by counsel, Defendant's D?

338

The Court: He said it was his wife.

Mr. Barber: I know.

Q. Do you think that is your wife's handwriting, or is it Mr. Rovetti's, or someone else's? A. This (indicating) is not my wife's writing here (indicating).

Q. How did you happen to say a minute ago that it was? A. It don't look to me as thought it was the same writing he has—that he has here (indicating).

By the Court:

339

Q. Who is Rovetti? A. He's the Police officer; the Traffic officer.

Mr. Fenton: He wasn't up there for three weeks afterwards.

By Mr. Barber:

Q. I show you paper marked Pltf's. 19, is that your wife's writing? A. No.

340 *By the Court:*

Q. Do you know whose it is? A. I don't know whose it is.

Mr. Barber: This Pltf's. 19 is report made by Mr. O'Brien, the defendant, which we offer for the purpose of showing the writing in Defendant's D was made by the same person; the same writing.

Mr. Fenton: I assume brother Barber's statement about what the paper is is correct. I haven't seen it.

341 Q. I want to again ask you what was your rate of speed when you drove off from the bridge—just before the accident? A. I wasn't going over two miles.

Q. How fast was Mr. O'Brien's car coming when it came toward you? A. Coming pretty fast.

Q. Can you give any estimate as to the rate of speed? A. I should judge that it was over fifteen miles an hour.

Q. Could two cars safely pass at the point of the accident if one of them was going at the rate of fifteen miles an hour? A. No sir.

By the Court:

Q. Do you mean the road wasn't wide enough there
342 for two cars to pass?

Mr. Barber: Not at fifteen miles an hour. They could go slowly and get by.

The Court: All right.

By Mr. Barber:

Q. Now what part of your car was damaged? A. My left wheel and mudguard.

Q. What happened to your front left wheel? A. It was underneath the frame of the car.

343

Q. Bent under the car? A. Under the car.

Q. Now what happened to the frame of your car? A. The frame of my car was sprung also.

Q. What happened to the left mudguard of your car? A. That was jammed.

Q. You say you purchased this Dodge car in May 1936? A. I did.

Q. And did it have on the windshield an Inspector's tag?

Mr. Fenton: I object to the question; that is pure hearsay.

344

Q. withdrawn.

Q. When you bought this Dodge car was there on the car an Inspector's tag, yellow tag?

Mr. Fenton: I object to the question as wholly immaterial whether there was or was not; so far as the condition of the brakes on the car is concerned it would be pure hearsay and nothing else, and its condition in the spring of 1936 is no evidence of its condition the last of August 1936—a car ten years old which had been driven all summer.

The Court: When was that inspection?

345

Mr. Barber: This Inspection tag was on the car when he bought it and I offer to show that this same tag was on it the day of the accident.

The Court: I think that inspection and tagging of the cars is required by law and I think the fact the car had a tag, I think that would be admissible, Mr. Fenton—official tag.

Mr. Fenton: I don't agree with Your Honor's view about it but if at all, it would only be at a time or within a reasonable time after the inspection was made and the tag affixed. On brother Barber's theory if you keep the tag on your car a year, that is all that is necessary.

346 The Court: I think it's evidence of the condition of the car at the time the inspection is required. Now about all there is to that, of course, is where a condition is shown to exist and is presumed to continue, would hardly apply to an automobile which is changing its condition often.

Mr. Fenton: It would apply to that period.

Mr. Barber: I submit there is a question pending which is admissible.

The Court: I think you are right about it. Admitted.

Mr. Fenton: May we have an exception?

The Court: Yes. Those inspections are all made by
347 official proclamation.

Mr. Fenton: They're made by garages designated by the Motor Vehicle Department.

The Court: At the time when they're made; we are given so long a time to be inspected. All right. The Court's question is withdrawn under exception.

Q. Was there on the car an Inspector's tag—yellow tag—when you purchased it?

Mr. Fenton: Until it appears when the inspection was made, I don't think Your Honor wants to rule the fact it was on there in May is any evidence. The inspection may have been in March.

348 The Court: I think the law is the Court and Judge and jury and everyone is supposed to know the period that that inspection covers, the same as we are supposed to know what day of the week a particular day of the month was, and if we don't know that fact, of course, you can send over to the Motor Vehicle Department and get a copy of their directions and read it to the jury.

Mr. Fenton: If the Court would permit a very brief divergence which will give you the point of this discussion—in one of the Bar examinations I had a question to define Judicial Notice and give three illustrations

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of its application. One of the answers given stated there were certain facts well known to every thinking person that even a Judge was presumed to know, and I take it this is one, although none of us know.

The Court: And I hope you marked that boy 100?

Mr. Fenton: I gave him 100 on that one.

(Recess)

Mr. Fenton: No questions.

Mr. Barber: That is all.

350

(Mrs. Stuart Holmes, Miss Veronica Conway and Mrs. Blanche Graham called as witnesses by the plaintiff, having been duly sworn, testified as follows:

* * * * * * *

Mr. Batton: That is the total of our evidence, Your Honor, except the fact we would like to introduce the life expectancy of the plaintiff.

The Court: That is another thing the Judge and jurors are supposed to know, but we don't.

Mr. Batton: In this instance her expectancy is 32½ years from the time of the accident, when she was 34 years old, and this is taken from the Union Central Life Insurance Co. table.

351

Mr. Fenton: I suppose it is the American Experience Table of Mortality.

Mr. Batton: Is that what it is? 32½ years from the date of the accident.

The Court: All right, gentlemen, we are supposed to know that. We are supposed to know what day of the week 4th of July was in 1776, but we don't.

Mr. Fenton: I don't think those expectancies are a matter of judicial notice; I hadn't understood so, but we always agree to admit them.

The Court: I think they are, Mr. Fenton.

Mr. Batton: The plaintiff rests. (4:17 p. m.)

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DEFENSE.

CLAYTON H. MAURICE, JR. called as a witness by the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Fenton:

Q. What is your full name? A. Clayton Henry Maurice, Jr.

Q. You live in Rutland? A. I do.

Q. You are an engineer? A. I am.

Q. You graduated from the Rensselaer Polytechnic
353 Institute? A. I am not a graduate.

Q. You attended there? A. I attended three years.

Q. Did you at the request of Mr. Carbine of my office, and with him make a survey of a section of the Rockingham road where it crosses the Williams river in Rockingham? A. I did.

Q. How long ago? A. Last Thursday.

Q. Did you make a map of your survey? A. I did.

Q. Is it drawn to scale? A. It is.

Q. What is the scale? A. One inch equals thirty feet.

Q. I show you blueprint marked Defendant's E and ask you if that is the plan of the survey you made? A. That is the plan.

Q. Will you tell us what it shows generally? A. Well
354 it generally shows territory surrounding the scene of the accident, showing the approach of the road, both ways, to the scene of the accident.

Q. Did your survey include that part of the highway so far north as the dwelling house of Mrs. Abbott? A. No, it did not.

Q. Do you know where that is? A. Well, Mrs. Abbott's house—if that is the——

Q. At the top of the hill? A. This survey goes approximately half way up the hill.

Q. What would be the proportion of the distance between the railroad underpass and the house at the top of the

hill that is shown on the plan? A. I would say about half way. 355

Q. And can you tell us what the distance is that is shown on the plan north of the underpass? A. Approximately 280 feet.

Q. Now then how much farther would you say the Abbott house was from what is shown on the plan? How far would you say the Abbott house was from the underpass? A. I would say 500 feet.

Q. How far is it from the underpass to the north end of the bridge? A. The north end of the bridge is 140 feet.

Q. And how long is the bridge? A. The bridge is 115 feet long. 356

Q. So that would make a distance from the south end of the bridge to the Abbott house approximately what? A. Well, that's very nearly 800 feet—750.

Q. Somewhere around 800? A. Yes.

Q. Are there trees there that you have indicated generally on the map? A. Well those trees are roughly located.

Q. They're drawn but not to scale? A. Not to scale.

Q. To show generally the character of the territory? A. The general location, yes.

Q. Will you tell us please what you found generally with respect to the width of the traveled part of that highway on that portion of it which you have surveyed and shown on your plan? A. I found the average width was about 14 feet. 357

Q. That was from edge to edge? A. Where a car could safely travel.

Q. Does it get a little wider as it comes into this curve (indicating) and before it gets to the bridge entrance? A. Yes, the curve is wide.

Q. What is the width of the road at the bridge entrance? A. At the bridge entrance the road is really as wide as the bridge is, which is 16 feet. The planking is only 12½ feet wide at the entrance to the bridge.

Q. So the road has to narrow up to the width of the planking? A. That's right.

358 Q. To twelve feet six inches? A. Yes.

Q. What is the widest place in the curve which you found, and I will ask you if you indicated it on the plan itself? A. I have indicated 17 feet wide on the curve.

Q. That includes the shoulders, does it? A. It doesn't go clear out where the shoulders are dangerous.

Q. But all that part could be traveled on—— A. Easily traveled.

Q. And as you go southerly or southwesterly from that does the road narrow up, or widen out from the curve? A. That is going away from the bridge?

Q. Yes? A. It narrows up.

359 Q. As you go north toward the bridge from the widest place in the curve, does it widen or narrow? A. It narrows down.

Q. How long a space is there where there is this width you have indicated as the maximum? A. I would say fifteen to twenty feet.

Q. Now tell us if southerly of the highway where it curves there there is some small water course? A. There is.

Q. Where does it start, if you know? A. Well it starts—comes down off the side hill from the road and goes into the ditch and proceeds down to the end of the guard rail, and then goes off down the hill away from the road—into the stream.

360 Q. Is there a spring in that generally immediate vicinity that you noted? A. Well I imagine this stream comes from this spring.

Q. What effect does that have on the edge of the road as affecting the travel? A. Well it keeps the road damp there.

Q. How about its being soft? A. It has a tendency that way I figured.

Q. As you come along on the shoulder of the road, as you round and after you round the curve, where the guard rail is, what is the general character of the shoulder? A. Well there is a drop in the shoulder there as you come on to

361

the guard rail for a little—a drop off of may be eight inches there.

Q. Will you tell us whether or not that has a tendency to confine the travel or to force the travel more toward the center of the highway?

Mr. Barber: I object to that.

The Court: Yes, I think that would be for the jury to say. Describe it.

Mr. Fenton: Very well; that is probably right.

Q. What is the width of the underpass? A. The underpass is thirteen (13)——

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Mr. Barber: How is that material in this case?

The Court: You started in up there General Barber and told all about the underpass, didn't you?

Mr. Barber: I didn't tell about the underpass. Our witness Wilson came down that road and through the underpass.

The Court: I will let this come in I think.

A. (continued) The underpass is 13 feet wide.

Q. What is the width of the roadway through the underpass? A. The roadway narrows down to approximately 9 feet through that underpass.

363

Q. What is the height of it? A. The underpass has 11 feet clearance.

Q. What generally is the character of the road as you go toward the north, as to whether being level? A. Coming out of the underpass, going north, there's a rather sharp upgrade.

Q. Is it straight or otherwise? A. Just coming out of the underpass there is a slight curve and then most of the hill up as far as I surveyed is straight.

Q. What is there beyond where you surveyed? A. There was a curve; continuing on up the hill.

364 C Q. I show you Defendant's B and C and ask you if that is the underpass you are talking about? A. Yes.

Q. In which direction is the camera pointing? A. In a northerly direction.

Q. Up the hill? A. Up the hill.

Q. How about C, is that the underpass? A. Yes.

Q. Which direction is it pointing there? A. Southerly, down the hill.

Mr. Fenton: We offer B and C.

The Court: Admitted.

365 Q. Now showing you Defendant's A will you tell me if that represents the approach from the south into the bridge? A. It does.

Q. And the curve we have been talking about? A. Yes sir.

Q. Does it correctly represent it as you saw it? A. Yes sir.

Mr. Fenton: We offer A.

The Court: Admitted.

Mr. Fenton: We offer this plan (Def. E).

The Court: Admitted.

366 Q. I will ask you to step down here and point out those things you have been talking about, on that plan, so the jury will understand it. (referring to Def. Ex. E) Point out, beginning at the lower right hand corner, where your highway starts, and just describe what you have been pointing out to me. A. To begin with these irregular shaped objects with a dot in the center denote trees or bushes, and the highway is marked by two lines continuing around the curve, and at the curve are guard rails which are small circles denoting the posts, with lines between them, and after the curve I have shown the covered bridge with dotted line showing the width of the planking on the inside of the bridge; the planking at the southerly edge of the

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bridge or the curve end being 12 feet 6 inches wide, and at the northerly end, the opposite end, it is 13 feet wide; then the road continues along to the underpass and I have denoted the Rutland Railroad as crossing over the underpass.

Q. That is the railroad of which your father is General Auditor? A. That's right, and then the road continues along up grade—up the hill. This (indicating) is Rockingham Station which is now closed, and these broken lines with crosses at each break denotes fences, and I have noted here the size in clearances of the underpass.

Q. The guard rail posts are put in exactly to scale measurement? A. Not to spacing of the posts.

368

Q. But the number of posts? A. Yes.

Cross examination by Mr. Barber:

Q. Are you able to give the grade, or does it appear what the grade is leading northerly through the bridge? A. I didn't measure the grade.

Q. Is there any purpose why you didn't? A. When I went down there I didn't take the equipment to do it.

Q. So you are unable to state what the grade is? A. That's right.

Q. But is there a grade? A. There is a grade there.

Q. What do you say the grade would be? A. On which part?

369

Q. Leading northerly through the bridge—through the underpass? A. There may be a slight grade but it is very small.

Q. What is it northerly of the underpass? A. It might be a 5 per cent grade beyond.

Q. Don't you think it is more than 15 per cent? A. I really couldn't say.

Q. You didn't have any purpose in taking that. You said something about the shoulders of the road being damp next to the spring? A. Yes.

Q. And the water that went by the guard. You spoke of the guard on the southerly side of the highway, did you? A. Yes sir.

Q. There was no waterway on the northerly side of the highway? A. No; not except the river which is down the bank.

Q. And now coming over to the southerly side of the highway as it leads into the bridge there is a little small drain? A. Well, there's water running in it.

Q. A very small quantity of water flows there? A. Yes.

371 Q. Probably there wouldn't be a sufficient amount to fill a half inch pipe? A. Why, I would say so.

Q. Not much more? A. Not a great deal.

Q. So there was nothing about that water that affected the shoulder of the road so far as making it available for travel purposes in your judgment? A. It could be traveled on but I believe it had a tendency to keep it soft.

Q. Now what do you mean by that answer—"tendency"? Do you mean it leaves the shoulder of the road on that side in such condition that it would be dangerous for a car to drive on? A. No, I wouldn't say it was positively dangerous.

Q. What do you say the width of the road is as it comes out of the bridge at the south end? A. The actual

372 width as it comes off the plank is 12 feet 6 inches wide.

Q. Now 15 feet from the southerly end of the bridge, what is the width of the road? A. It approaches 17 feet wide; it widens toward the 17 feet.

Q. Now you know what the uniform width of a passenger car is—automobile? A. I do.

Q. It's about 5 feet 6 or 8 inches? A. It borders right around 70 inches; 68 to 70 inches.

Q. So in your judgment at that point would there be sufficient space for two passenger cars to pass if they were using reasonable care?

373

Mr. Fenton: I think he can testify as to whether the road is wide enough to permit two cars seventy inches wide to pass, but the qualifications of the question are not for him to pass on.

The Court: The jury can tell that as well as he can. He can give the width of the car and the width of the road.

Q. withdrawn.

Q. Now starting at the point on your plan 15 feet southerly of the bridge and continuing on up the hill, I notice on your plan the road does not narrow up at all, is that right? A. It does.

374

Q. Is it shown on your plan? A. No.

Q. So—— A. It does; it shows it slightly on the plan.

Q. But you have shown on the plan that the road runs continuously the same width clear up through? A. That is merely for ease in drawing.

Q. I notice you have shown the road straight as you go away—one hundred or one hundred and fifty feet away from the bridge. Do you think the plan is right in that regard? A. Well, after it comes out of the curve the road straightens out.

Q. But that road all the way going up the hill is a winding road, is it not? A. It didn't impress me as that at all.

375

Q. You don't pretend to tell us these marks—parallel marks—you have put on at the south end of the bridge to show the highway are accurate as showing the width of the highway going southerly from the bridge? A. Well I hold them to be accurate in this way, that I have made notations on there giving actual widths.

Q. And are those marks that you have made to indicate bushes and trees, are they to scale? A. The bushes and trees are not to scale.

Q. Just simply ornamentation you put on the plan to show your idea of it? A. Actually, yes.

376 Q. Now I believe you stated you made this last Thursday? A. I did.

Q. You haven't seen the premises where this accident occurred in August of 1936 or thereabouts? A. No sir.

Q. When you went there last Thursday was the first time you examined the premises? A. Yes sir.

Q. Now on your plan as you come out of the south end of the bridge going southerly and swing around the curve westerly, you put some round dots and a straight line connecting—— A. Those dots. That's to——

Q. —— represent the guard rail? A. Yes sir.

Q. On the northerly side of the road? A. Right.

377 Q. But these dots that you have placed there were placed promiscuously, or without any idea of having them conform to the scale? A. Those between the dots?

Q. Yes? A. That's right.

Q. You are not able to say how many posts there are in that guard rail from the bridge to where the guard terminates? A. I counted them, and I put that number in.

Q. Taking this line which you have put here at the south end of the bridge and following around on the northerly side of the road, up the hill, how much space is there between that line and the guard rail? A. Well, after you —between that line and the guard rail, when I put that in I put it in to designate the part of the road that is easily traveled. The road actually comes right up to the guard

378 rail at that point.

Q. There's nothing between what you have indicated as the extreme margin—northerly margin of the road, and the guard rail to prevent a car from going along there? A. No sir.

Q. And a car coming out of the bridge could be driven right around there close to the guard rail? A. Yes. Not all the way—not all the way along up to the end of the guard rail; just on the first part of the curve.

Q. Did you make any examination to ascertain whether there was any one of those guard rails had been broken? A. I did not.

379

Q. Now you haven't any judgment or opinion as to what the per cent of grade is as you go southerly out of the bridge and up the hill? A. Well, in this way—it's less than it is coming up here out of the underpass (indicating); that's all I can say.

Q. Is it approximately the same per cent of grade south of the bridge as it is after you go north from the underpass? A. No, of course, on here (indicating) there's more or less of a gradual approach to the hill itself.

Q. But do you know what the grade is as it comes south out of the bridge and up the hill? A. I do not.

Q. I call your attention to Pltfs. Ex. 3 and ask you to look at that—if you will hold it please. Does that make 380
a fair representation of the bridge and the location of the premises as you saw them last Thursday? A. I would say it does.

Q. I call your attention to a shadow southerly of the bridge; does that indicate to you that is quite a little up grade from the bridge? A. Well, it denotes an up grade.

Q. What per cent would you say? A. I can't say.

Q. You haven't any idea? A. I have not.

Q. I call your attention to Def. Ex, A, are you familiar with that? A. I am.

Q. Do you think that's a fair representation of the premises at this south end of the bridge? A. I do.

Q. And there is a very abrupt curve, is there not? A. Yes, there is. 381

Q. And there's no tree there now, or is there? A. That tree is there. That is—that is supposed to be the tree I have drawn in here (indicating).

Q. Now do you know what the distance is between those posts—the first one from the bridge? A. No, I don't.

Q. And what the distance is to the next one? A. No, I don't.

Q. Do you know what the length of those planks are individually? A. No.

Q. You didn't measure them? A. No.

382 Q. I don't suppose there's any reason why you didn't measure them? A. No, there isn't.

Q. As a matter of fact they're about eight feet in length, and those posts about eight feet apart. I will show Def. Ex. A to the jury if I may? (hands exhibit to juror.) A. I should hesitate to estimate.

Q. As I understood from your answer and the testimony which you gave while Mr. Fenton was examining you, this embellishment you put on your plan to show the trees and bushes was done free hand; there's no measurement about those? A. That's right.

383 *Redirect examination by Mr. Fenton:*

Q. Take this total measurement of guard rail—is that an actual measurement from the bridge to the end of the guard rail, so you know how far the guard rail does come in fact on the highway? A. That is an actual measurement.

Q. But you did not measure between the posts? A. No sir.

Q. Now you were asked about the roadway coming up to the guard rail. Does Pltfs. Ex. 10 show the general condition of the surface between the traveled part and the guard rail itself? A. Yes.

Q. And is that true in Defendant's A which the mem-
384 bers of the jury are now looking at? A. They're practically the same picture.

Q. Did you mean by your answer that a person could travel by putting his wheels over that grass and through that brush if he wanted to? A. Not up here (indicating). As I said I believe, down closer to the bridge that grass and stuff narrows down.

Mr. Fenton: That is all.

(RECESS TAKEN AT 4:50 UNTIL 9:30 TOMORROW MORNING.)

385

(DR. ARTHUR C. LISTON called as a witness by the defendant, having been duly sworn, testified as follows: * * * .)

GEORGE H. O'BRIEN, the defendant, having been duly sworn, testified in his own behalf as follows:

Direct examination by Mr. Fenton:

Q. Your name is George H. O'Brien? A. Yes sir.

Q. You are the defendant in this case? A. Yes sir.

Q. How old are you? A. I am forty-five (45) years old.

386

Q. You live in Rockingham? A. I do.

Q. What is your business? A. I am a farmer.

Q. You know Margaret Conway, of course? A. I do.

Q. She is your wife's sister? A. She is.

Q. I want to get your attention back to the 27th of August, 1936, the day when an accident occurred there at the Williams River bridge. You recall that, do you? A. Yes.

Q. How did you happen to go down to Miss Conway's home that morning? A. My wife had made arrangements with the girls to get them a corned beef and cabbage dinner and I went down to get them.

Q. When you speak of the girls you refer to Miss Conway and your wife's nieces? A. I do.

387

Q. From Ontario? A. From London, Ontario.

Q. Will you tell the jury generally the character of this road after you leave the main road to go down and through the bridge and under the tracks and up to your home? A. It's a very narrow road and it's a dirt road; there's very little gravel on it.

Q. Is it a road that is traveled very much? A. Not an awful lot, no.

Q. How many families live out there? A. You mean clear to Springfield?

388 Q. No, in the general community? A. There's one, two, three, four, five, six families.

Q. Is it used generally by anyone other than those six families? A. Very few.

Q. That isn't the main road to Springfield? A. No, it isn't really the main road. There's another road they call the Missing Link road that most people take; that's right up the Connecticut river.

Q. Now what kind of car were you driving? A. I was driving a 1934 Ford V8.

Q. Was that a coach or sedan? A. It was a coach.

Q. Won't you describe the construction of the interior
389 of it—the seating? A. There are two doors. It was what Ford calls a Tudor—a door on the side and the door on the driver's side.

Q. A left hand drive? A. Yes, it is.

Q. And where were the persons sitting in the car? A. Miss Mary Walker was sitting on my side; right beside me in the same seat, and Miss Conway was sitting directly behind her, and Miss Anna Walker was sitting directly behind me.

Q. As you came down to the point where this accident happened, will you tell us at what rate of speed you were traveling? A. As I came down where?

Q. To the point where this accident happened? A. I was traveling about fifteen miles an hour.

390 Q. Can you tell us where you were traveling in the highway? A. Well I was coming right straight along where the cars originally run, and there is a track there.

Q. Now will you please tell us in your own way just what happened there? A. Well as I was coming down this grade approaching that sharp curve, and just as I got to the curve, Mr. Wilson's car shot out of the bridge. I swung my car to the right as quick as I could and put on the brake for all I was worth, and he struck me right in the forward front wheel—right in the fender. The bumper of my car was untouched.

Q. What happened then? A. And then he pushed

me a little to the right and his car set back and the right hind wheel went through the guard rail as he came out of the bridge. 391

Q. I show you this picture, Def. Ex. A, do you recognize it as the place where the accident happened? A. Yes sir.

Q. Or the general location? Has it the two boards of the guard rail on the left or north side of the road? A. Yes sir.

Q. All the way up to the bridge? A. All the way up this way (indicating).

Q. Now do you see in the photograph the location of the guard rail that his right rear wheel went through? A. 392
It's hidden by the bushes.

Q. Was it the upper or lower guard rail? A. The lower guard rail.

Q. Will you make a cross on the upper guard rail of that section? You have now marked that with a cross mark? A. Yes sir, of the lower rail.

Mr. Fenton: The defendant marks this rail here (showing it to the jury) but describes the place being broken as the lower of the two rails which is hidden by the bushes.

Q. Now can you point out in there the place where your car came to a stop? A. Right about there (indicating). 393

Q. And will you make a cross mark on the highway with a pen? You have now made another cross mark on the right toward the other guard rail? A. Yes sir.

Q. Was there some paint mark or something left on the guard rail on your right hand side after the accident? A. I didn't notice at the time but afterwards Mr. Whitney——

Q. Never mind that. Was your attention called to it and did you see a fresh paint mark? A. I did. My attention was called to it.

Q. Can you indicate about where that was on the rail? A. Yes sir, here (indicating).

394 Q. And you have made a cross mark just toward the bridge from the third post on the guard rail? A. Yes.

Q. That is this mark right here (indicating). Did you make some observation as to wheel tracks of your car after the accident? A. I did not.

Q. You didn't make that observation? A. No sir.

Q. It has been stated here that as you came around the curve, you cut toward the left of the curve. What do you say about that? A. Just as quick as I see that car come through here and shoot out towards me, I done my best to get to the right.

Q. Was there any time you turned your car to the
395 left so as to cut the curve—toward the left? A. Well, I might have been following these tracks here (indicating).

Q. You mean following the tracks? A. The main track where the cars originally run.

Q. Was there a place on the highway where the earth was packed down more by the cars having passed over it in one course? A. Yes, there was.

Q. And is that what you mean by following the tracks? A. That's exactly what I mean.

Q. Will you tell us, Mr. O'Brien, what, if anything, there is on the right side of the road that affects the surface? A. There's a spring there and it's all mud on that side of the road.

396 Q. Have you noted that in passing over that road, or did you note it before this accident and since the accident? A. It has been there ever since I can remember of going over that road. It's always been wet on that side. I have seen cars get in there and get stuck and have to be hauled out.

Mr. Barber: I object to that.

Mr. Fenton: That is merely describing the nature of it.

Mr. Barber: I move that be stricken out—he has seen other cars——

397

The Court: Well, no, but you can ask him if the cars got stuck, when the weather condition was always the same.

Mr. Barber: But he's showing the condition at other times and not what they were the time of the accident.

The Court: I will let it stand.

Q. How long have you lived where you do now? A. All my life, sir.

Q. How long have you been traveling over that road? A. Well, all my life.

Q. Was the condition which you have described any different on the 27th of August, 1936 than it was at other times when you have spoken about cars getting stuck? A. It was wet there then. 398

Q. Now will you tell us something about the character of the shoulder of the road up near the guard rail as you approached the bridge, and I mean the guard rail on your right? A. It's soft.

Q. Is there any place where it breaks away before you get to the guard rail? A. No, I wouldn't say.

Q. You don't recall about that? A. Here's your pen (handing fountain pen to Mr. Fenton.)

Mr. Fenton: Thank you.

Q. After the accident did you move your car? A. Yes sir. 399

Q. Tell us what you did about that? A. I got in my car after the young ladies had got out, and I see that Margaret's head was bleeding, and I told her I would move my car and get someone to take her to the hospital as quick as I possibly could.

Q. Did you go anywhere to get anyone at the suggestion of Mr. Wilson? A. I went on my own hook.

Q. Did he say anything about your getting anyone? A. Yes, he said we ought to get some help and I said I would go.

400 Q. Where did you move your car to? A. I backed it right straight across the road in front of Mr. Wilson's.

Q. That is in front of the way his car was headed? A. Was headed.

Q. And on that side of the road? A. On that side of the road.

Q. By the way how long is your car? A. I think a 1934 deluxe coach had a wheel base of 116 inches. Now I wouldn't say that for sure.

Q. Now was there some overhang beyond the wheel base, both in front and in the rear? A. Yes.

Q. About how much would the overall be? A. Well,
401 I would imagine that the fenders and mudguard would stick out eight inches.

Q. How about the bumper in front? A. Well, the bumper—as I say, in the rear and front, eight inches; I am guessing at that—I don't know; I never measured it.

Q. Will you tell us what part of your car was damaged? A. The "X" was sprung.

Q. The front—— A. The front "X" was spring right near the left wheel, bent over to an angle, and the mudguard was smashed entirely.

Q. Was there any glass broken in your car by the collision? A. Glass in the front light.

Q. Front headlight? A. In the front headlight was the only glass that was broken.

402 Q. Windshield? A. The windshield was not broken and there were no windows in the car broken, nor the dome light in the top of my car was not broken.

Q. How nearly to a stop was your car when the actual collision happened? A. Well I done the best I could but I can't say.

Q. Had you slowed it down from the fifteen miles an hour that you said you were driving? A. I certainly did.

Q. Did you while you were there and while Mr. Wilson's car was there see some test made of his brakes? A. I certainly did.

Q. Who made that? A. Harry Reed.

403

Q. And what was the result of that test—what did you see done? A. The foot pedal went clear to the floor. He done that at the request of Chief Tracy.

Q. Chief of Police of Bellows Falls? A. Chief of Police of Bellows Falls at that time. He's dead now.

Q. How long ago did he die? A. I think he died this winter.

Q. Now what effect did the application of that brake by pushing it way to the floor have on the Wilson car? A. I cannot understand your question. You mean—it didn't have any braking power.

Q. It didn't have any braking power? A. Yes, went clear to the floorboard.

404

Q. Did you hear Mr. Wilson make any statements about his brakes while you were there? A. No.

Q. You didn't hear that? A. No, I didn't hear that.

Q. As you saw Mr. Wilson coming out of the end of the bridge, where was he with respect to the sides of the bridge—where was his car? A. Well he was to the left—or to the right.

Q. He was to the right? A. Yes.

Q. Did you see him do something? A. I did. I see him reach for his emergency.

Q. Did that ave any effect? Did you see his car stop or slow down? A. I couldn't, no sir, there was no time to.

405

Q. Did you make any inspection yourself of Mr. Wilson's car? A. No sir.

Q. You spoke about the black mark on the guard rail. Were those white guard rails, or white at some time? A. They were white.

Q. Was there any mark of any kind on the fenders of your car on the right hand side? A. It was.

Q. Tell me about that. A. Well, because my attention was called to that and I looked, and there was—my mudguard was marked.

Q. With what? A. The paint was off.

406 Q. Of your mudguard? A. Yes, the blue paint was off my mudguard.

Q. Whereabouts? A. Right where it would naturally hit that rail.

Q. At any time from the time you left Miss Conway's home in Walpole up until the time of this accident, did anyone in the car make any suggestion about your method of operating it? A. No sir.

Q. Or make any complaint about the way you were operating it? A. No sir.

Q. As you approached this place where the accident happened, did you at any time blow your horn? A. No sir,
407 I didn't.

Q. At any time did you hear any horn blown before this accident? A. No sir, I did not.

Q. Either from Mr. Wilson's car or anyone else? A. From no place.

Q. At the time that the actual contact—the collision occurred, will you tell us where your car was with respect to the center of the highway, as to whether to the left or the right or where it was? A. Well, it was a little to the right.

Q. Of the highway? A. Yes.

Q. You spoke about seeing Mr. Wilson reach for his emergency brake; did you notice what, if any, effect that had on the direction in which his car was going? A. No.

408

Mr. Fenton: That is all.

Cross examination by Mr. Batton:

Q. Mr. O'Brien, I show you Def. Ex. A and will you tell us where the traveled part of the highway is going around the curve and leading into the bridge? A. Right around there (indicating).

Q. Are you pointing to the center of the road? A. Yes sir, the center, as far as it goes there. You see over here it is further this way, and right here it's in the center, and

as it approaches the bridge it swings to the left as you approach it.

Q. That is, it would swing to your left as you approach the bridge opening yourself? A. To his left. Yes, to my left—that's right.

Q. Now it swings to your left and you just testified a moment ago that you stayed in the center of the highway? A. Yes, around here (indicating).

Q. And as you rounded the curve you continued to stay in the center of the highway? A. No, I said as he came out I put on the brake and swung to the right.

Q. You further testified that is a very sharp curve, didn't you? A. Yes.

Q. You testified that a lot of trees were grown up the entire length of this railing on the westerly side of the road? A. Yes, there was. There was a lot of brush there.

Q. Now from a distance of 75 or 80 or 100 feet or something like that from the entrance of the bridge you couldn't see the entrance from where you were driving, could you? A. Oh no.

Q. How close would you get to the opening of the bridge would you say before you can see a car that might be coming out of the bridge? A. You would have to get very close; almost down to here (indicating).

Q. Well, how far would that be, 30 or 40 feet? A. I don't know how long those guard rails are; I was trying to count them; probably 30 feet; I imagine them rails are ten foot long.

Q. That would be—— A. 30 feet I judge.

Q. How many car lengths, approximately, if you know? A. Two.

Q. In other words you get within two or let's say three car lengths of the bridge before you can actually see the opening with all the brush that's there? A. ell I would judge so.

Q. repeated by reporter. A. Yes.

Q. Now were you quite familiar with that road? A. Yes, I have been over it all my life.

412 Q. You knew that that was almost a right angle corner there? A. I certainly did.

Q. You knew that it was a public highway? A. Yes sir.

Q. You knew that in approaching that bridge or that corner that extreme care and caution had to be exercised? A. I did.

Q. Now you said it was not a very heavily traveled highway? A. No.

Q. And when you went around that corner you really didn't expect to meet anybody, did you, Mr. O'Brien? A. Well, I have met cars there before.

413 Q. But on this particular occasion you didn't really expect to meet anybody, did you? A. Well, I couldn't say; I couldn't say whether I did or didn't. I can't remember what I was thinking of at that time.

Q. As a matter of fact you were actually talking with Miss Walker on the front seat, weren't you? A. I might have been.

Q. If you were talking with her you probably looked around to say something to her and just as you looked up, smashed into the other car, isn't that the way it happened? A. No.

Q. But you did follow the actual traveled way around that corner? A. As far as I went, until I saw him coming.

414 Q. When you saw him you realized you were on the left and swung to the right but were too late and you crashed? A. I wouldn't say I was over to the left.

Q. Well your left wheels—if you were in the center of the highway, as you made that turn you looked up and saw Wilson—you couldn't get your left wheels past the center of the highway and past the right hand side of the traveled way—— A. It all depends on how much time you had.

Q. Well how much time did you have? A. Well I couldn't say. There wasn't much time to lose.

Q. You had very little time? A. Yes, very little time; seconds.

Q. Now from just what you said, you didn't stay to

415

the extreme right of the road as you went around this last part of the curve, did you? A. No, I didn't. I wasn't clear up——you mean on the shoulder?

Q. Yes? A. I didn't get up there.

Q. It would have been safe to drive up on the shoulder, wouldn't it? A. Well, yes, if you was going at a snail's pace. If you was going awful slow you could have got by that way but you couldn't—you couldn't drive around there very fast.

Q. Well now Mr. O'Brien, do you remember an occasion when Mr. Barber and I called on you down at Brattleboro when you were at the hospital? A. Yes sir.

Q. You were down at the Brattleboro Hospital some 416
six or eight months ago—probably a little longer than that? A. Yes sir.

Q. When you were there did Mr. Barber and I call on you? A. You did.

Q. And by the way this was before this suit was brought? A. Yes.

Q. We had a conversation with you while there? A. Yes.

Q. Did you tell us in the course of that conversation that you felt that you were to blame for the accident, but you were no more to blame for it than Wilson? A. I don't remember of telling you that.

Q. But you might have told us that? A. I might have. I don't remember—I don't remember telling of it. 417

By the Court:

Q. Will you say you didn't? A. Well, I can't remember.

By Mr. Bation:

Q. Well will you say now that you didn't tell us that? A. No, I wouldn't say that, because I might of.

418

Q. You said you were approaching the curve at fifteen miles an hour approximately? A. Fifteen miles approximately. That is what I put on my report.

Q. Do you know Mr. O'Brien that you cannot make that curve at fifteen miles an hour? A. I can make it at fifteen miles, yes.

Q. At fifteen miles an hour? A. Yes.

Q. Is there room at the corner there—at the curve, for two cars to pass? A. Just about, Mr. Batton.

Q. Well you heard this engineer, Mr. Maurice, yesterday testify that there was seventeen feet across the curve there? A. I might have.

419

Q. Well that is what he did testify.

Mr. Fenton: That is the maximum distance at any place in the curve. It narrows up either way.

A. Does that mean there's fifteen feet of good roadbed for two cars to turn out on?

Q. Well according to our engineer, Mr. Chase, there's fourteen feet of good roadbed. According to Mr. Fenton's engineer there's seventeen feet maximum.

Mr. Fenton: On a place where cars could get in one section of the curve?

Mr. Batton: Yes.

420

Q. Now there would be room in that fourteen feet of traveled space there for two cars to pass, would there not? A. If one car pulled up on this side and stopped, which they do, and the other car pull on the right, then you can get by. You pull up on the left and stop, and the other car pull up on the right and pass, you can get by, because I have seen it done a good many times.

Q. Have you ever done it? A. Yes.

Q. Have you always stopped? A. Not always.

Q. Then you traveled by other cars moving in that particular place in the past? A. Once or twice.

421

Q. When you did that how fast were you going? A. At a snail's pace.

Q. Then you knew as you approached this curve if you did meet another car there at this blind corner, that you would have to be coming at a snail's pace to pass them? A. I did.

Q. Yet you entered it at the speed of something less than fifteen miles an hour? A. I say I was going at that day fifteen miles an hour.

Q. You were not going at a snail's pace? A. No.

Q. Then you were going at something a little less than fifteen miles an hour? A. That day?

Q. Yes? A. Well, I wouldn't say. I said I was 422
going at the rate of fifteen miles an hour that day. That is what I judge it.

Q. What were you going when you went into this curve—around it? A. Fifteen miles an hour.

Q. As you went around the curve? A. Yes.

Q. Then you had approximately only three car lengths as you turned this curve before you entered the bridge?

The Court: That is what he said.

Mr. Batton: I want to show he should have known if he met a car there and he was traveling fifteen miles an hour, he couldn't possibly have avoided an accident there.

Mr. Fenton: He didn't state that. 423

Mr. Batton: He said he would have to be traveling at a snail's pace to pass a car at this particular intersection.

Q. You wouldn't call fifteen miles an hour a snail's pace?

The Court: He's already told you that.

A. No, I wouldn't.

424 Q. Then in rounding this curve at the speed at which you were driving, you knew that if you met another car there that you couldn't pass it safely at the speed at which you were driving?

The Court: He's already told you that exactly.

Q. You and Mr. Wilson live how far apart? A. About three quarters of a mile.

Q. That is, on the same road? A. On the same road.

Q. You have seen each other quite a bit? A. Yes.

Q. And you have been more or less friendly? A.
425 Always.

Q. Did you or your brother sell Mr. Wilson a house? A. My brother and I sold him.

Q. You and your brother. There was still an unpaid balance on it—— A. Yes sir.

Q. —— due to the sale and at the time of this accident he was four or five months back in his rent or payment? A. I couldn't say as to that.

Mr. Fenton: I object to that.

The Court: What has that to do——

Mr. Batton: I offer to show the similarity between two reports that have been made to the Motor Vehicle Department by Wilson and O'Brien——

426 The Court: All you have to do is look at them.

Mr. Batton: I want to show these men were friendly and they didn't want any trouble to arise over this accident and they both got together and made out a report so there wouldn't be any trouble arise or blame either one of them.

The Court: You may ask him that.

Mr. Batton: I want to show Wilson felt he was under some obligation to Mr. O'Brien and was ready to cooperate with him.

The Court: You may show that they got together and made reports the same.

427

Mr. Batton: I am not sure they actually got together.

Q. You don't remember back that far?

The Court: He needn't tell whether they owed one another or not. If they got together and agreed to make the reports the same, you may ask him that.

Q. Did you and Mr. Wilson get together and agree to make out your reports just about the same? A. I made out my report the night after the accident.

428

By the Court:

Q. Did you and Wilson get together and agree to make out your reports just about the same? A. No, we didn't.

Q. Did you have any talk with one another about how you were to make out the reports? A. After I made out my report, he sent for me that night and asked me if I could help him make out his report.

By Mr. Batton:

Q. That's the way you got them the same? A. I had my report made out and mailed I think—I am pretty sure I mailed it that night; I couldn't say——

429

By the Court:

Q. Did you help Wilson make his report? A. I offered some suggestions. His wife made out the report.

Q. She did the writing? A. She done the writing.

By Mr. Batton:

Q. Were you present when she made it out? A. I was in the kitchen.

430 Q. Did you tell his wife how you had drawn a picture of your car and represented Wilson's car? A. No, I didn't tell him how I drew mine.

Q. You just let him go ahead and draw their own pictures as they wished? A. Yes, they asked me if I drew a picture and I said I did, so she drew the picture.

Q. Did you look at it? A. No sir.

Q. You didn't see it? A. I didn't see it and I don't know who signed it or anything because I left.

By the Court:

431 Q. At whose house was that made out? A. At Mr. Wilson's.

By Mr. Batton:

Q. Now I show you Def. Ex. D which represents the report made by Mr. Wilson. Does that represent the true position of the automobiles as they were on the highway at the time of the accident? A. Pretty close.

The Court: Now Mr. Batton, how can you expect to add anything to what he has told you about how these cars were at the time of the collision and just before?

432 Mr. Batton: Well Your Honor, I thought that I would show that the accident couldn't have happened if the cars were as represented there.

The Court: Do you need to do any more than show that?

Mr. Batton: No, probably not.

Q. Is that your signature on Pltfs. 19? A. That is.

Mr. Batton: We offer Pltfs. 19.

The Court: Admitted.

433

Q. How far back did Mr. Wilson's car go following the impact? A. It went—it cracked the guard rail.

The Court: Now he's been all over that with you.

A. (continued) It didn't break the guard rail right off. Well, it made a dent in it.

Q. Well I mean by that at the time of the impact, when the two cars hit, was your car driven backwards by the force or was Wilson's? A. My car was driven to the right a little.

Q. And Wilson's was driven backwards? A. Backwards.

434

Q. How far back did his car go? A. I am not good on feet and inches but I would judge it was driven back a foot and a half perhaps.

Q. Now where was Wilson when you came around the curve? A. In his car, driving it.

Q. I mean with respect to the road, was he on the right or left? A. He was on the left.

Q. He was on the left of the road? A. I told you that once.

Q. Do you mean he was on the left hand side of the bridge coming out? A. Yes.

Mr. Batton: That is all.

435

Redirect examination by Mr. Fenton:

Q. You spoke of your long knowledge of this highway at this point. Will you tell us whether or not it was because of your knowledge of it that you were driving your car at the slow rate that you described? A. It certainly was.

Mr. Batton: I object to that. He was not driving at a slow rate.

Mr. Fenton: May be fifteen miles an hour is speeding but I hadn't supposed it was.

436 The Court: He said he should have been going at a snail's pace.

Mr. Fenton: No, he didn't say that.

Q. Will you tell me whether at the rate at which you were going, had a car come through the bridge at the same speed, you could have stopped or negotiated your car down to the snail's pace that you spoke of so that you could pass safely? A. It could be done if a man had time.

Q. Now will you tell me how Mr. Wilson's car was proceeding, whether at a slow speed or a rapid speed? A. I should call it a rapid speed.

437 Q. Could you give us some general idea, or did you see it long enough to give us an idea in miles per hour, or how could you characterize it? A. Oh no, I couldn't—I couldn't in miles per hour.

Q. Had his car been coming at the speed at which yours was going, will you tell us whether or not there would have been an opportunity to pass safely?

Mr. Barber: I object to that, asking the witness to make a comparison on that.

Mr. Fenton: You have been asking him all through the cross examination about speeds, and I have, on that very thing—that is one of the important points.

The Court: I will allow it.

438 A. Yes, I think we could have passed.

Mr. Fenton: That is all.

Recross examination by Mr. Batton:

Q. Now you stated I believe that Mr. Wilson came out of the left hand side of the bridge? A. Yes.

Q. On Wilson's left? A. As you come out of the bridge the cars all follow to the right.

439

Q. Now if he had been on his left hand side of the bridge, or on your right hand side of the bridge, you could have—ordinarily have seen him much sooner and much quicker, could you not? A. Did I say he come out on the right?

Q. I said your right; that would be Wilson's left. Strike that please. Perhaps we are not clear on that. Which side of the bridge did Mr. Wilson come out on, on the left or right hand side? A. On the right hand side where the road is naturally traveled.

Q. In other words, he was where he should have been? A. Absolutely.

Q. As he came out of the bridge? A. Yes. Did I get muddled on that? I am sorry if I did. I meant to say that. 440

(Recess taken at 11:43 until 1 p. m. awaiting arrival of a witness from Bellows Falls.)

(Thursday, Aug. 3, 1939, 1 p. m.)

George H. O'Brien recalled.

Recross examination by Mr. Batton: (continued):

Q. You stated a while back I believe that you followed the beaten tracks of the road down around to the curve, did you not, into the curve? A. Well, do you mean back from the bridge, or as you make the curve and you go around towards the bridge? 441

Q. As you make the curve coming around towards the bridge? A. I started in those tracks—I started down hill in those tracks.

Q. Now as you proceeded around the curve, how long did you stay in those tracks? A. Until I saw Mr. Wilson's car shoot out of the bridge toward me.

Q. And when you saw Mr. Wilson's car shoot out of the bridge, then what did you do? A. I pulled to the right and put on my brake for all I was worth.

442 Q. How far around the curve, if you can give us in an estimate of feet, had you proceeded in the beaten tracks? A. I couldn't tell you in feet. I would have to go and measure that. Gosh, that's a pretty hard question to ask. I can't tell you.

Q. But you proceeded around, as you previously stated I believe, until you saw Wilson's car. You were at that time about thirty feet from the car when you saw it? A. I wouldn't say thirty feet; I couldn't say.

Q. That is what you said previously? A. That might be.

443 *By the Court:*

Q. Would it be less than that? A. I counted the posts. I think it's three lengths, and they are ten or twelve feet, and then I judged it thirty feet.

By Mr. Batton:

Q. Now you said Wilson was on his own right hand side of the road where he belonged? A. As he came out of the bridge.

Q. As he came out of the bridge and approached you? A. On the right hand side?

444 Q. That's right? A. Yes.

Q. Now Mr. Wilson could have done nothing more or less than stop; that's all he could have done? A. That's right.

Q. He couldn't have turned over any nearer to the rail than he was? A. Not where he was before his car came out of the bridge, but as you pass that curve, then you could swing a little to the right more.

Q. Did he swing a little to the right more as he came out? A. No.

Q. You don't know whether he did or didn't? A. No, there wasn't time to make up your mind.

445

Q. Then in order to avoid the crash there it was up to you to either apply your brakes or swing to the right, is that right? A. Yes.

Q. It was up to you to do that? A. Yes and I tried it.

Q. If you had been coming slower than you were coming, do you feel that the crash could have been avoided? A. Not at the clip that Mr. Wilson was coming.

Q. Now you stated in the evidence a while back when Mr. Fenton asked you the first time how fast Wilson was going, that you didn't know. Later he asked you how fast he was going and you said Wilson was going at a pretty fast clip. What do you want us to take for your answer there? A. He was coming pretty fast.

446

By the Court:

Q. In going through that curve did your left wheels go over the center of the traveled part of the road? A. It did when I turned my car to the right.

By Mr. Batton:

Q. In other words at the instant you saw Mr. Wilson, you were still in the traveled part of the highway? A. I was a little over, as I said before I think, to the right of the traveled part of the highway.

447

Q. But your left wheel—you say you were a little over, so that would mean your left wheel was over the center of the highway? A. No, I wouldn't say it was over the center of the highway.

Q. Were they anywhere in the curve? A. No, not until I made the turn to the right.

By the Court:

Q. Would a turn to the right put you to the left of the center of the traveled part? A. Yes.

448 *Transcript*

RALPH A. WILSON recalled.

Recross examination by Mr. Fenton:

Q. Mr. Wilson, following this accident and at the time when Mr. Harry Reed was there, will you tell us if you stated to Mr. Reed in substance this: "I hit just as I came through the bridge and then my car went to the right and into the fence." Did you state that to Mr. Reed in substance? A. Not as I know of.

Q. Will you say that you didn't say that? A. Personally I don't think I said a word to Harry Reed.

449 Q. Well was that the fact about it, that you hit just as you came through the bridge and then your car went to the right and into the fence? A. Make that more distinct if you can?

Mr. Fenton: Won't you read it, please?

Q. repeated by reporter. A. I had gone out of the bridge about ten feet.

Q. Ten feet?. A. I wouldn't estimate the distance because I don't know.

Q. Well did your car go to the right and into the fence after the cars hit each other? A. We had come around the bend; Mr. O'Brien hit me and pushed me back into the rail

450 —back into the rail.

Q. Now will you say definitely whether you did or did not tell Mr. Reed that you hit just as you came through the bridge and then your car went to the right and into the fence? A. I didn't tell Mr. Reed anything.

Redirect examination by Mr. Barber:

Q. How far was your car from the bridge when it came in contact with O'Brien's car? A. How far was it out of the bridge?

Q. Yes? A. I should say around ten feet.

451

Q. About ten feet? A. Yes.

Q. As you came out of the bridge were you on your right hand side of the road? A. I was.

Q. And were you as near to the rail—guard rail on your right hand side as it was practicable to be? A. I was, yes sir.

Mr. Barber: That is all.

HARRY R. REED called as a witness by the defendant, having been duly sworn, testified as follows:

452

Direct examination by Mr. Ryan:

Q. Your name is Harry R. Reed? A. Yes sir.

Q. Do you live in Bellows Falls? A. Yes sir.

Q. What is your occupation? A. Garage owner.

Q. Of a Garage? A. I don't own the building but I operate one.

Q. You are a mechanic and operate a repair shop? A. That's true.

Q. Calling your attention to the time when the automobiles of Mr. O'Brien and Mr. Wilson were in collision near the bridge running across the Williams river in Rockingham, do you recall that occasion? A. Yes sir.

453

Q. Were you called to the scene of that accident? A. I was.

Q. And did you go? A. I did.

Q. Upon arrival there will you tell what the position of the Wilson car was on the highway? A. As you come out of the bridge, it was on the right hand side of the road, just a very few feet out of the bridge, and the front end was sticking over just a little, over the embankment.

Q. Did you notice whether or not the O'Brien car was there on the highway? A. Yes, it was directly in front of it on the left hand side of the road—which would be the wrong side—he told me he moved it there himself.

454

Q. How far back from the Wilson car was it? A. Oh, not very many feet; just a short distance; I couldn't say exactly.

Q. Have you some judgment about how far the Wilson car was from the south approach to the bridge, to the south entrance of the bridge rather? A. Somewhat but not exactly. I would say a matter of fifteen feet.

Q. Now during the time you were there did you have some conversation with Mr. Wilson? A. Yes sir.

Q. Did he tell you that his brakes were no good? A. Said he couldn't stop.

Q. Yes, and did he also tell you that his brakes were

455 no good?

Mr. Barber: I submit that is leading.
Mr. Fenton: That is impeachment.
The Court: I will allow it.

Q. repeated by reporter. A. He remarked that he couldn't stop.

By the Court:

Q. Well, did he tell you that the brakes were no good is the question? A. I think he did.

456

By Mr. Ryan:

Q. Did he also tell you on that same occasion and at the time he was telling you about the brakes and about the inability to stop, that he was to blame for the accident? A. I wouldn't say he said so.

Mr. Barber: I object to that Your Honor.
The Court: Didn't they lay the foundation for that? Yes, that is a proper question to impeach Wilson. Who called Wilson?

457

Mr. Fenton: They called Wilson and in our cross examination I asked him if he didn't say so and so.

Q. Now in connection with the happening of the accident, did he tell you that he hit just as the car came through the bridge? A. That was what was told me.

Q. By Wilson? A. And O'Brien both.

Q. And that then the Wilson car went to the right and into the fence? A. Yes sir, that's the position it was in when I got there. I was under that impression; that's all I know about it; I didn't see it go there.

Q. Wilson told you that there at the time of the accident? A. Told me what? 458

Q. That his car went to the right after they hit, and into the fence? A. I think Mr. Wilson did. I know George O'Brien told me that any way.

Q. While you were there and after your conversation with Wilson about his brakes being no good did you then examine the brakes? A. Chief Tracy asked me to. He appeared on the scene and he asked me to but there was no brakes at that time; I don't know what they were before that.

Q. What did you do in the examination of the brakes? A. Opened the door and got in and put my foot on the pedal.

Q. What happened? A. They went clear to the floor. 459

Q. What would that indicate to you? A. That they wouldn't function.

Cross examination by Mr. Batton:

Q. When Mr. Wilson said that the car was pushed to the right, did he say the whole car or the rear end had been pushed to the right, Mr. Reed? A. Nothing was said in regard to what part of the car, only just that the front end was out of the road and sticking into the bank.

460 Q. It might have been when he said that that he meant the rear end of the car was pushed over? A. It's possible.

Q. You did not inquire? A. I did not, no sir.

Q. You didn't check the emergency brake, did you? A. No sir.

Q. So the emergency brake as far as you know, might have been perfectly all right? A. Well, it's called an emergency brake but very seldom used for that.

Q. Well, of course, you don't know whether he used it or not? A. I do not.

Q. Did you notice whether it was off or on? A. No.

Q. So as far as the emergency brake was concerned, it might be in perfect shape for all you know? A. Possibly.

461 Q. Now did your get under Mr. Wilson's car and examine the underneath part? A. No sir.

Q. Then as far as you know the impact of that crash might have broken the rods leading from the brake back to the rear wheels, might it not? A. That's true.

Q. Was Mr. Wilson's car badly damaged? A. I don't hardly think so but I didn't look it over too much; I wasn't there for that purpose. I went after the O'Brien car.

Q. But you had to tow it away? A. He asked me to. He asked me to move it up the road a few feet. It was more than a few feet.

Q. Now when Wilson said to you that he couldn't stop in time, did he say with that period of time, that he
462 didn't have enough time to stop because of the closeness of the cars, or was it because of the brakes, or did he state?

Mr. Ryan: I object to that. Objection waived.

A. As I remember it he just remarked that he couldn't stop.

Q. So that as far as you know it might have been because he was surprised because the cars came together so quick, or anything else? A. Yes.

Q. Now you towed Mr. O'Brien's car back to your garage, did you? A. Yes sir.

463

Q. And did Mr. O'Brien go with you? A. Yes sir.

Q. And after going into the garage, did you and Mr. O'Brien have some conversation as to who was to blame for this accident?

Mr. Fenton: We don't object to this only it isn't cross examination and we reserve the right to cross-examine about it.

The Court: All right.

Q. repeated by reporter. A. Why we had that on the way down as far as that goes, while I was towing it in.

Q. What was said at that time on the way down? A. 464
He repeatedly told me that he was just as much at fault as Wilson was.

Q. And did he say this again after coming into the garage, in the presence of your wife? A. He told me that only a very short time ago.

Q. How long ago? A. I should say the last time he told me was a matter of a month and a half or two months.

Redirect examination by Mr. Ryan:

Q. Mr. Reed, do you recall the manner in which Mr. O'Brien made this statement that he was as much to blame as Mr. Wilson—do you recall it was in a peculiar 465
way as though he was trying to exonerate Mr. Wilson as much as possible? A. Well, George is a peculiar acting fellow any way.

The Court: He ought to tell what was said, so the jury can decide that.

Mr. Fenton: This is cross examination, your Honor.

The Court: His opinion isn't admissible. He ought to tell——

Q. withdrawn.

466 Q. Did you tell me when I talked with you on February 10th, Mr. Reed, that O'Brien said those words in a peculiar way, as though he was trying to excuse Wilson, although Wilson was admitting his blame? A. I am trying to think of just what you asked me. Will you say that again?

Q. repeated by reporter. A. Possibly I did. I cannot exactly remember that.

Q. That's the fact about it, isn't it? A. Well, I might have drawn that conclusion.

Q. That is what you told me on the 10th of February, isn't it? A. Possibly. I should say "yes."

467 Q. That's a fact, isn't it? A. That he acted peculiar about it?

Q. Yes? A. Well he—yes, I should say "yes."

Mr. Fenton: The defendant rests (2:05 p. m.)

(In Chambers.)

Mr. Fenton: At the close of all the evidence the defendant moves that the Court direct a verdict in his favor on the ground that viewed in the light most favorable to the plaintiff, the evidence does not tend to establish gross negligence on the part of the defendant, nor raise a question upon which the minds of
468 reasonable men may differ as gross negligence is defined by the Vermont cases.

The Court: Motion denied and the defendant has an exception.

(Copy of proposed Charge handed to attorneys at this time.)

(In Courtroom.)

Mr. Barber makes the opening argument for plaintiff: (2:07) * * * (2:45 p. m.)

469

Mr. Ryan makes the opening argument for defendant: (2:45) * * * (3:05 p. m.)

(RECESS.)

Mr. Fenton closes for the defendant: (3:22) * * * (4 p. m.)

Mr. Batton closes for the plaintiff: (4:01) * * * (4:30 p. m.).

(RECESS TAKEN AT 4:30 UNTIL 9:30 TOMORROW MORNING.)

(Friday, August 4, 1939, 9:30 A. M.)

470

(In Chambers.)

Mr. Barber: The plaintiff requests the Court to charge the jury in addition to what it has already indicated it would say, as follows:

In determining whether the defendant was guilty of gross negligence as defined by the Court, you should consider the width of the highway at the point of the accident; the defendant's attention or non-attention to his driving; whether or not he kept a proper lookout for others using the highway; consider the speed of his car at the time of the accident; consider whether his car was under proper or reasonable control on entering the curve; consider his familiarity with the premises; 471
that he was well aware that two cars could not pass at the point of the accident "unless they were going at a snail's pace"; consider whether the defendant knowingly drove his car "faster than a snail's pace." The Court calls your attention to the evidence so far as it relates to the foregoing facts or claimed facts bearing upon the accident as to whether the defendant was guilty of gross negligence as defined by the Court.

The Court: I decline to elaborate on the evidence and refuse these requests and the plaintiff has an exception.

472 *Transcript*

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT.

Civil Action No. 21.

MARGARET CONWAY

v.

GEORGE H. O'BRIEN.

473

DEFENDANT'S REQUESTS TO CHARGE.

The defendant requests the Court to substitute for paragraph 1 in the proposed Charge, the following: "Here the question is: Did O'Brien guide his car to his left of the center of the highway in rounding this curve and did he fail to blow his horn? If so, was he grossly negligent in so doing? Was that the cause or one of the causes of the collision and her injuries?

(2) The defendant requests the Court to insert before
474 next to last paragraph in proposed Charge, the following: "A violation of these statutes raises a rebuttable presumption of negligence. The true test is: What would a prudent person have done under the circumstances, that is a question for you to decide."

Respectfully submitted,

GEORGE H. O'BRIEN

By FENTON, WING & MORSE,
His Attorneys.

(In Courtroom.)

CHARGE. (9:50 A. M.)

Gentlemen of the Jury:

Here the question is: Was O'Brien grossly negligent in guiding his car to his left of the center of the highway in rounding this curve, if he did that, at the speed he did and failing to blow his horn—was that the cause or one of the causes of the collision and her injuries?

AS TO THE BURDEN OF PROOF. The burden of proof is on the plaintiff to prove that O'Brien was grossly negligent. This does not mean that she must produce more or even as 476
many witnesses as the defendant, but it means that after considering all the evidence, all the inferences, and all the probabilities that you are more inclined to believe that he was grossly negligent. The way you are more inclined to believe is the true test and the scales always tips according to that belief without regard to the number of witnesses on a side. If the scales just balance, or tip in the defendant's favor, then the plaintiff has failed to prove her case as the law requires and cannot recover. You consider where the preponderance of the evidence is; where the fair balance of the evidence is; and the preponderance of the evidence and the fair balance of the evidence is as you are more inclined to believe. Consider the width of the road, and the speed; his acquaintance with the locality and highway; and all the 477
facts and circumstances and decide whether he was grossly negligent.

AS TO THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT TO BE GIVEN TO THEIR TESTIMONY. The law is that you are not bound to give the same weight, or the same credit, or have the same faith in the testimony of each witness but you should give their testimony just such weight, just such credit, and have just such faith in it as you think it is fairly entitled to receive. Consider their appearance while testifying—their candor or lack of candor—their feelings, or bias, if any—their interest in the result of the

478 trial, if any. You may believe as much or as little of the testimony of each witness as you think you ought to. Believe it all, not believe any of it, believe a part and disbelieve the other part, just as you think you ought to.

The State of Vermont has made laws—enacted statutes; one is: "All curves shall be approached and entered with due care to avoid accident, and all vehicles rounding the same shall keep as far to the right hand side of the highway as reasonably practicable and proceed with due care to avoid accident." Another is: That in going around a curve or before passing any other vehicle which is proceeding in his direction, or at any point or place where his vision of
479 the road ahead is obstructed, the driver shall signal with a horn. Still another is: That the operator of a motor vehicle who carries another person without being paid for it, shall not be liable for injuring her unless such injuries are caused by his gross negligence.

It is for you to decide whether O'Brien was or was not grossly negligent, notwithstanding he violated these statutes, for they are not controlling in deciding what is gross negligence or what is ordinary negligence. Here is a definition of gross negligence that is controlling and which distinguishes gross negligence from ordinary negligence. It is the only true test in deciding what is gross negligence.

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence.
480 Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence or error in judgment or momentary inattention. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is heedless and palpable violation of legal duty respecting the rights of others. Gross negligence is manifestly a smaller amount

of watchfulness than the circumstances require of a prudent person. Reckless conduct or reckless disregard of the rights of others illustrates gross negligence exeeedingly well as applied to this case.

There may be two or more causes of this collision and injuries. Whether Wilson's negligence was one cause is unimportant in this case if O'Brien's gross negligence was another cause. Wilson's negligence in causing the collision, if any, does not prevent Conway from recovering pay for her injuries from O'Brien if his gross negligence was one of the causes of the collision and her injuries. If she was injured by the combined negligence of Wilson and the gross negligence of O'Brien, they are each personally liable to 482
pay for her injuries. She has the right to sue and recover her damages from one or both of them—when one pays that discharges the other.

If you decide that O'Brien was grossly negligent in driving his car to his left of the center of the highway in this curve, if he did that, at the speed he did without signalling with his horn, instead of driving at a slower speed, keeping as far to his right as was reasonably practicable and sounding his horn—if that caused his collision with Wilson and injured Conway, your verdict will be that O'Brien is liable, then decide her damages for O'Brien does not claim that she was contributorily negligent. If you do not decide that his gross negligence caused the collision and her injuries, your verdict will be that he is not liable. 483

As to the law relating to damages. How much she was injured and how much she has or will recover are questions for you to decide on all the evidence, all the inferences and all the probabilities. In her writ she sets her damages at $20,000.00—what amount she ought to have is for you to decide. She is entitled to have just, full and adequate compensation for all her injuries—the injuries to her head and nervous system being the more important—and just, full and adequate compensation for all the pain and mental anguish she has suffered up to this time and for all she will suffer in the future as the natural and probable

484 consequence of her injuries. She is entitled to have just, full and adequate compensation for all she has lost up to this time by her total, partial and impaired ability to work as a housekeeper and for all that she will lose in the future as the natural and probable consequence of her injuries, at what her services would be reasonably worth if she had not been injured. She can have but one recovery—this is her only opportunity to have a jury decide her damages—and for this reason the damages she will sustain in the future as the natural and probable consequence of her injuries, such as loss of earnings, pain and mental anguish, must be included in your verdict at this time. She is entitled to
485 have such reasonable and necessary expenses as she has incurred for the services of physicians, hospital service and nursing, and the fair and reasonable value of her clothing that was destroyed. (10:05.)

(In Chambers.)

Mr. Fenton: The defendant excepts to the Charge of the Court as stated in the first paragraph, beginning "Here the question is" * * * and ending with "her injuries," because as stated we think the only fair construction of the language is the assumption as a fact that the defendant guided his car to the left of the center and failed to blow his horn, and in that connection we
486 except to the refusal of the Court to charge our first request as a substitute for paragraph one, viz., "Here the question is: Did O'Brien guide his car to his left of the center of the highway in rounding this curve and did he fail to blow his horn? If so, was he grossly negligent in so doing? Was that the cause or one of the causes of the collision and her injuries?" We think this submits to the jury the question of fact as to whether O'Brien did guide his car to the left and did fail to blow his horn, and then submits whether if so he was grossly negligent in so doing, and in that connection we think the words "if he did that, at the speed he did", following

487

the words "rounding this curve" limits the words "if he did that" to the matter of speed.

(2) The defendant excepts to the refusal of the Court to comply with our second request which is to insert before the words near the bottom of the first page—"Still another is"—the language of our request: "A violation of these statutes raises a rebuttable presumption of negligence. The true test is: What would a prudent person have done under the circumstances, that is a question for you to decide." The ground of the exception is that is it for the jury to say in the first instance whether the defendant was traveling in a place where a prudent man would have traveled? If so, whether he was to the left of the center of the highway is not material. That it is for the jury to say whether a prudent person blows his horn, or would blow his horn on every curve, and if a prudent person would not have blown his horn on every curve, or on that curve, then O'Brien was not negligent in failing to do so, and if he was not negligent, he could not have been grossly negligent.

488

(At 10:55 the jury return to the courtroom.)

The Court: Yes, Mr. Foreman?

Foreman: Your Honor, there seems to be some misunderstanding as to the meaning of gross negligence. If we could have that definition, please?

489

The Court: I am not surprised. The Bar and the Judges have had a lot of difficulty and disagreements.

Now keep in mind that you are to decide whether he drove to his left of the center; whether he blew his horn. I believe he said he did not blow his horn, so there's no controversy about the horn; of course, it was not blown, and then the speed he was going—he says about fifteen miles. You decide whether he was at his left of the center, and he did not blow his horn,

490 and going at fifteen miles an hour or thereabouts. Then to those facts you apply the definition.

It is for you to decide whether O'Brien was or was not grossly negligent, notwithstanding he violated these statutes, for they are not controlling in deciding what is gross negligence or what is ordinary negligence. Here is a definition of gross negligence that is controlling and which distinguishes gross negligence from ordinary negligence. It is the only true test in deciding what is gross negligence.

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary
491 negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence or error in judgment or momentary inattention. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is heedless and palpable violation of legal duty respecting the rights of others. Gross negligence is manifestly a smaller amount of watchfulness than the circumstances require of a
492 prudent person. Reckless conduct or reckless disregard of the rights of others illustrates gross negligence exceedingly well as applied to this case.

Now you decide whether he went to his left of the center? Then consider that he did not blow his horn, and the speed he was going—fifteen miles—and decide whether that was reckless conduct or reckless disregard of the rights of others, which illustrates gross negligence exceedingly well as applied to this case. Now can I do anything more for you, Gentlemen?

Foreman: I think not, Your Honor.

493

The Court: Of course, in deciding these questions you will consider the curve—how sharp it was, the width of the road, all the facts and circumstances bearing upon how a person should drive, what speed he should drive and where he should drive in the road. (11:04.)

(In Courtroom.)

(The jury reports at 2:30 p. m.)

494

The Clerk: Mr. Foreman, has the jury agreed upon a verdict?

Foreman: Yes sir.

The Clerk: *Verdict for Plaintiff.*

In this cause the jury c. their oath say that the defendant is liable in manner and form as the plaintiff in her complaint hath alleged and find for the plaintiff to recover from the defendant Ten Thousand Dollars ($10,000.) damages.

FRANK A. KELLOGG,
Foreman.

495

Mr. Foreman, is that the jury's verdict?

Foreman: It is.

The Clerk: So say you all, Gentlemen?

Jurors: We do.

The Court: You may enter judgment on the verdict.

496

CERTIFICATE.

I, Katharine A. Gardner, stenographic reporter, hereby certify that the foregoing pages numbered from 1 to 170, inclusive, contain a verbatim transcript of my verbatim stenographic notes taken of the evidence and proceedings in re *Civil Action No. 21 Margaret Conway v. George H. O'Brien*, except where same was ordered "off the record," from August 1 to 4, inclusive, 1939.

497

KATHARINE A. GARDNER,
Official Reporter.

Dated:
Burlington, Vermont,
December 28, 1939.

498

Judgment Order

499

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF VERMONT

Civil Action No. 21

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN

500

JUDGMENT ORDER

ORDERED that judgment be, and it hereby is, entered on the verdict for the plaintiff to recover from the defendant $10,000.00 damages.

Done in Court at Montpelier, in the District of Vermont, this 4th day of August, A. D., 1939.

HARLAND B. HOWE
United States District Judge.

501

Endorsed:
Filed August 4, 1939
AUSTIN H. KERIN,
Clerk.

502 **Notice of Appeal**

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

Civil Action No. 21

MARGARET CONWAY

v.

GEORGE H. O'BRIEN

503

NOTICE OF APPEAL

Notice is hereby given that George H. O'Brien, Defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on August 4, 1939.

Signed

GEORGE H. O'BRIEN

By FENTON, WING & MORSE

504 His Attorneys.

By CHARLES F. RYAN

Address

Rutland, Vermont.

Endorsed:
Filed October 23, 1939
A. MYRL BLAKELY,
Deputy Clerk.

Supersedeas Bond

505

UNITED STATES OF AMERICA

DISTRICT OF VERMONT

Civil Case No. 21

MARGARET CONWAY

v.

GEORGE H. O'BRIEN

506

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, GEORGE H. O'BRIEN, of Rockingham, in the County of Windham, in State of Vermont, as principal, and THE AETNA CASUALTY & SURETY COMPANY, a corporation duly organized according to law with its principal place of business at Hartford, in the State of Connecticut, and duly authorized to do business within the State of Vermont, as surety, are held and firmly bound unto MARGARET CONWAY, in the sum of Eleven Thousand Dollars ($11,000), to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, administrators, executors, successors and assigns, respectively, firmly by these presents. 507

Signed with our hands and sealed with our seals and dated this 12th day of October, A. D., 1939.

WHEREAS the defendant, George H. O'Brien, is about to prosecute his appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the judgment entered in said cause by the United States District Court for the District of Vermont, on the 4th day of August, 1939, against the defendant for the sum of Ten Thousand Three Hundred and Four Dollars ($10,304).

508 *Supersedeas Bond*

NOW, THEREFORE, the condition of this obligation is such, that if the above named defendant, George H. O'Brien, shall prosecute his appeal to effect and shall answer all damages and costs if he fails to make good his plea, then this obligation to be void, otherwise to be in full force and virtue.

GEO. H. O'BRIEN (SEAL)

THE AETNA CASUALTY & SURETY COMPANY

By S. B. HUNGERFORD
509 Resident Vice President.

Attest:
C. M. DRISCOLL
Resident Asst. Secretary
(COMPANY SEAL)

Countersigned in Vermont BERT S. HYLAND, Agent.

Approved
HARLAND B. HOWE
Judge.

510 Endorsed:
Filed October 21, 1939
ARNOLD A. MURRAY
Deputy Clerk.

Stipulation As To Transcript

511

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

FOR THE SECOND CIRCUIT

At Law No. 21.

MARGARET CONWAY

v.

512

GEORGE H. O'BRIEN

STIPULATION.

It is hereby stipulated and agreed that the transcript of record in the above entitled case, under appeal by the defendant, shall contain the testimony only of plaintiff witnesses, Heman Chase, Myra Abbott, Margaret Conway, Cora W. Reed and Ralph A. Wilson, and defendant witnesses, Clayton M. Maurice, Jr., George H. O'Brien, Ralph A. Wilson and Harry R. Reed for the reason that they are the witnesses as to the question of liability and other witnesses testifying at the trial did not testify on this question.

513

HERBERT G. BARBER
FENTON E. BATTON
Attorneys for Plaintiff.

FENTON, WING & MORSE
Attorneys for Defendant.

Endorsed:
Filed January 4, 1940
AUSTIN H. KERIN
Clerk.

514 **Stipulation As To Exhibits**

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Case No. 21.

MARGARET CONWAY

v.

GEORGE H. O'BRIEN

515

STIPULATION AS TO EXHIBITS

Whereas in the above entitled cause the exhibits consist of photographs, drawings and blueprints which are difficult to reproduce in the printed record, it is accordingly

STIPULATED AND AGREED, by and between the parties hereto that with the approval of the Court copies of said photographic exhibits, drawings and blueprints may be submitted to the Court and that the same need not be reproduced in the record.

516 Dated, this 18th day of November, A. D., 1939.

HERBERT G. BARBER
FENTON E. BATTON
Attorneys for plaintiff.

FENTON, WING & MORSE
Attorneys for defendant.

Endorsed:
Filed January 4, 1940
AUSTIN H. KERIN, Clerk.

Stipulation As To Damages 517

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Case No. 21

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN

518

STIPULATION.

It is stipulated and agreed that upon the pending appeal, no questions relating to the subject of damages are involved, and that no exceptions concerning that subject are presented for review. For that reason the evidence relating to damages has been omitted from the record on appeal by stipulation of the parties.

Nothing herein shall be construed as in any way prejudicing the rights of the defendant, upon any subsequent trial of this cause, to contest the amount, character and extent of the damages claimed to have been suffered by the plaintiff, and such right is expressly reserved.

Dated this 14th day of December, A. D., 1939. 519

HERBERT G. BARBER
FENTON E. BATTON
Attorneys for Plaintiff.

FENTON, WING & MORSE
Attorneys for Defendant.

Endorsed:
Filed Jan. 1940
AUSTIN H. KERIN
Clerk.

520 **Stipulation As To Record**

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

FOR THE SECOND CIRCUIT

At Law No. 21.

MARGARET CONWAY

v.

521 GEORGE H. O'BRIEN

STIPULATION AS TO RECORD.

It is hereby stipulated and agreed that the following enumerated papers shall constitute the printed transcript of the record for transmission to the Circuit Court of Appeals for the Second Circuit, on appeal, wherein said George H. O'Brien is appellant and said Margaret Conway is appellee:

1. Caption.
2. Statement.
3. Writ of attachment and return.
4. Plaintiff's complaint and return.

522 5. Motion for more definite statement in complaint and notice of service.

6. Letter of January 2nd, 1938 to Clerk of United States Court concerning the filing of the motion of the defendant to bring in a third-party defendant.
7. Motion of defendant as a third-party plaintiff to bring in a third-party defendant.
8. Summons to third-party defendant.
9. Complaint of defendant George H. O'Brien as a third-party plaintiff against Ralph A. Wilson third-party defendant.

10. Plaintiff's bill of particulars.
11. Defendant's answer.
12. Plaintiff's answer to motion of defendant to bring in third-party defendant.
13. Order of Court denying motion to bring in third-party defendant.
14. Exceptions to denial of motion to bring in third-party defendant.
15. Transcript of proceedings at trial, including preliminary hearing on motion to make known defendant's insurance coverage, Court's order for same and defendant's exceptions to such order, examination of jurors and defendant's exceptions to such examination, testimony of plaintiff witnesses, Heman Chase, Myra Abbott, Margaret Conway, Cora W. Reed, Ralph A. Wilson, and defendant's witnesses, Clayton H. Maurice, Jr., George H. O'Brien, Ralph A. Wilson and Harry R. Reed, defendant's motion for directed verdict and exceptions to overruling of motion, Court's charge and defendant's exceptions thereto and verdict. 524
16. Judgment order.
17. Notice of appeal.
18. Supersedeas bond.
19. Stipulation as to evidence.
19a. Stipulation as to exhibits.
20. Stipulation as to record. 525

HERBERT G. BARBER
FENTON E. BATTON
Attorneys for Plaintiff.

FENTON, WING & MORSE
Attorneys for Defendant.

Endorsed:
Filed Jan. 4, 1940
AUSTIN H. KERIN, Clerk.

526 **Order Extending Time For Filing Record**

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN

527

ORDER EXTENDING TIME FOR FILING RECORD

Now, within forty days from the date of the Notice of Appeal herein, it is ORDERED that the time for filing the Record on Appeal and docketing the action be and the same hereby is extended to and including, December 30, 1939, all in accordance with Subdivision (g) of Rule 73 of the Rules of Civil Procedure.

Dated at the City of Rutland in the County of Rutland, in said District, this 21st day of November, A. D., 1939.

528 HARLAND B. HOWE
District Judge.

Endorsed:
Filed November 21, 1939,
AUSTIN H. KERIN,
Clerk.

Order Extending Time For Filing Record 529

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN

The time for filing the record is extended to January 530
10, 1940.

(s) HARLAND B. HOWE
United States District Judge.

Filed:
11:11 A. M., December 27, 1939
AUSTIN H. KERIN,
Clerk.

531

532 **Order Extending Time For Filing Record**

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN

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533 The time for filing the record in the Court of Appeals is extended to January 16, 1940, inclusive.

(s) HARLAND B. HOWE
United States District Judge.

Filed:
January 3, 1940
AUSTIN H. KERIN,
Clerk.

534

Stipulation and Order Extending Time For Filing Record 535

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 21.

MARGARET CONWAY

vs.

GEORGE H. O'BRIEN 536

TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT:

The plaintiff agrees that the time for filing the record and the defendant's brief may be extended to February 15, 1940.

HERBERT G. BARBER
FENTON E. BATTON
Attorneys for plaintiff.

So ordered:
D. E. ROBERTS,
Clerk.
January 11, 1940. 537

ENDORSED:
Filed January 16, 1940
AUSTIN H. KERIN,
Clerk.

538 **Clerk's Certificate**

UNITED STATES OF AMERICA,

DISTRICT OF VERMONT

CLERK'S CERTIFICATE.

I, AUSTIN H. KERIN, Clerk of the District Court of the United States, within and for the District of Vermont, in the Second Circuit, do hereby certify that the foregoing pages numbered 1 to , inclusive, contain a true and correct transcript of the record as stipulated by and between the parties, except the summons to third-party defendant
539 which was not issued and including the stipulation that the question of damages was not to be reviewed in this appeal, together with the orders extending the time for filing the record, in the cause entitled:

MARGARET CONWAY,

Appellee

vs.

GEORGE H. O'BRIEN,

Appellant

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540 The exhibits as per the stipulation as to exhibits contained in the transcript of record are not attached to the printed record but are to be handed to the Court by the parties.

IN TESTIMONY WHEREOF, I have hereunto caused the seal of said Court to be hereunto affixed at the City of Burlington, in said District of Vermont, this day of in the year of Our Lord One Thousand Nine Hundred and Forty, and of the Independence of the United States the One Hundred and Sixty-Fourth Year.

.....

Clerk.

[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 287

(Argued April 8, 1940. Decided April 29, 1940)

MARGARET CONWAY, Appellee,

against

GEORGE H. O'BRIEN, Appellant

Appeal From a Judgment of the District Court for the District of Vermont in an Action to Recover Damages for Personal Injury to the "Guest-Occupant" of a Motor Car

Before L. Hand, Augustus N. Hand and Patterson, Circuit Judges

Walter S. Fenton for the appellant.
Herbert G. Barber and Fenton E. Batton for the appellee.

[fol. 182] L. HAND, C. J.:

This is an appeal from a judgment entered upon a verdict, holding the defendant, O'Brien, liable for a collision between a motor car which he was driving and another car, driven by one Wilson, upon a little travelled country road in Vermont. The plaintiff was a passenger in O'Brien's car, and her right of action for injuries depends upon the "Guest-Occupant" law of Vermont (Public Laws of Vermont, § 5113), by which the operator of a motor is not liable for injuries to "any occupant of the same" unless the operator receives pay for carrying the occupant, "or unless such injuries are caused by the gross or wilful negligence of the operator". The only point we shall consider is whether the evidence of the defendant's "gross * * * negligence" was enough to support a verdict. The collision happened just south of a covered bridge crossing a small river running east and west; O'Brien was going north, Wilson south, and the cars came together about twenty feet beyond the south end of the bridge. The jury was justified in finding that O'Brien had been clear over on the west side of the road, until he saw Wilson's car come out from the bridge. Coming from the south the road runs almost east for some distance, and then turns on a radius of about sixty feet through an angle of about 70° to enter the bridge. The

road is seventeen feet wide at the widest part of the turn and fourteen to fifteen elsewhere, and is protected by a fence because the ground slopes off sharply to the east. There is a down grade of about nine degrees approaching the bridge from the south, and the view to the left is somewhat obstructed until one gets fairly on the turn. O'Brien's car was going at only fifteen miles an hour (as to this there was curiously enough no dispute) but he did not blow his horn, or do anything to avoid collision until he saw Wilson emerge, [fol. 183] when he swung sharply to the right so that the collision was between the left fore wheels of each car. Wilson swore that he was moving at two miles an hour, and that he blew a horn before entering the bridge. Any such speed is of course incredible, but the issue is not important, as his speed does not count in determining O'Brien's negligence. Only five or six families lived on the road, and the wheel tracks at the turn showed that it had been the custom to take it on the left side in order to make the turn more easily.

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied. A statute like that before us presupposes that the answer to the general question has been against the defendant (that is, that his conduct has been inexcusable) but it imposes upon his liability a condition which cannot even be described in quantitative terms; not only must the interest which he would have had to sacrifice be less than the risk to which he subjects others, but it must so far fail to match that risk that some opprobrium or reproach attaches to him. In Powers v. Wilson, 110 F. (2d) —, we had this statute before us, and thought this the most satisfactory approach to the solution of a problem, essentially self-contradictory, since it professes to set a quantitative standard for the measurement of incommensurable factors. The leading case in Vermont is Shaw v. Moore, 104 Vt. 529, the opinion in

[fol. 184] which has been often cited; the definition there given contains such descriptive phrases as "more culpable than ordinary negligence", "utter forgetfulness of legal obligations"; "heedless and palpable violation * * * respecting the rights of others"; "short of being such reckless disregard * * * as is equivalent to a wilful and intentional wrong"; "culpability which characterizes all negligence * * * magnified to a high degree". Dessereau v. Walker, 105 Vt. 99, 102, speaks of "culpability of an aggravated character"; Franzoni v. Ravenna, 105 Vt. 64, of "indifference to his duty to his guests, or utter forgetfulness of their safety"; a phrase repeated in Anderson v. Olson, 106 Vt. 70, L'Ecuyer v. Farnsworth, 106 Vt. 180, Garvey v. Michaud, 108 Vt. 226, and Ellison v. Colby, 8 Atl. (2) 637. At times the court has been content merely with another phrase from Shaw v. Moore, supra, "failure to exercise even a slight degree of care". All these are indeed formally quantitative and probably that is unavoidable, but since no common measure is strictly possible, we think that our gloss is a fair one. The situations in which the court has allowed verdicts to stand or not, are so various that little can be drawn from them, as the court itself has repeatedly said. In Hall v. Royce, 109 Vt. 99, and Farren v. McMahon, 110 Vt. 55, for example, we own that the negligence does not seem to us to have involved grave dereliction; quite as little as in Franzoni v. Ravenna, supra, (105 Vt. 64), L'Ecuyer v. Farnsworth, supra, (106 Vt. 180), or Garvey v. Michaud, supra, (108 Vt. 226). Uniformity being impossible, we are left to consider how loudly O'Brien's conduct cries for censure. See also our discussion of a similar statute in Cusack v. Longaker, 95 F. (2d) 304.

It is of course always careless to drive on the wrong side of the road on a curve, where one cannot see ahead; it is careless to do so even at so low a speed as fifteen miles; another car may be coming fast, and a collision may be in-[fol. 185] escapable. But few who have driven a motor, do not at times take the chance, when going slowly on a back country road; most of us rely more than we should upon our alertness to become aware of, and our deftness to avert, oncoming danger; we should not, but we do; and in the hierarchy of guilt such carelessness does not stand high. O'Brien conceded that he knew the spot well and that it ought to be taken at a "snail's pace" if another car was coming; what he did was to assume the risk, and it was not

a great one. Nor was he so totally without excuse as in other situations which themselves would be border-line—a car climbing a hill on the wrong side, for example, which has no reason not to keep to the right; O'Brien was in a position where it saved him trouble to cut the curve. Had he been driving twice as fast, or on a much travelled highway, we might think otherwise; but on that road and at that speed it seems to us that his fault was only a routine dereliction, not grave enough to fall within the statute. It is plain from the Vermont decisions that we cannot properly devolve the entire responsibility for a decision upon a jury.

The defendant moved for a verdict at the close of the evidence, and the court denied it without reserving decision. Before the New Rules that would not have allowed us to dismiss the complaint under Baltimore & Caroline Line v. Redman, 295 U. S. 654; but Rule 50 (b) provides that when such a motion is denied at the close of the evidence, the judge is to be "deemed to have submitted the action to the jury subject to a later determination"; which is the equivalent of a reservation. It is not necessary that he should deny the motion once again; his failure to vacate his first order is enough. Hence it is proper here to dismiss the complaint. Leader v. Apex Hosiery Co., 108 F. (2d) 71, 81 (C. C. A. 3); Massachusetts Protective Ass'n v. Mouber, 110 F. (2d) 203, 207 (C. C. A. 8).

Judgment reversed, complaint dismissed.

[fol. 186] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of May one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges.

MARGARET CONWAY, Plaintiff-Appellee,

v.

GEORGE H. O'BRIEN, Defendant-Appellant

Appeal from the District Court of the United States for the District of Vermont.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Vermont, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded with instructions to dismiss the complaint.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 187] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Margaret Conway v. George H. O'Brien. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 17, 1940. D. E. Roberts, Clerk.

[fols. 188-223] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of June one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges.

MARGARET CONWAY, Plaintiff-Appellee,

v.

GEORGE H. O'BRIEN, Defendant-Appellant

A motion having been made herein by counsel for the appellee to recall and amend the mandate of this court heretofore issued herein,

Upon consideration thereof it is Ordered that said motion be and hereby is denied.

D. E. Roberts, Clerk.

[fol. 224] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Margaret Conway v. George H. O'Brien. Order. United States Circuit Court of Appeals, Second Circuit. Filed June 6, 1940. D. E. Roberts, Clerk.

[fol. 225] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 224, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Margaret Conway, Plaintiff-Appellee, against George H. O'Brien, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal.)

[fol. 226] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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AUG 17 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HERBERT G. GARBER,
FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,
JEROME F. BARNARD,
1422 F Street, N. W.,
Washington, D. C.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. .....

MARGARET CONWAY, *Petitioner,*

v.

GEORGE H. O'BRIEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS

May It Please the Court:

The petition of Margaret Conway respectfully shows to the Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, plaintiff-appellee below, a citizen of New Hampshire, recovered judgment against the respondent, defendant-appellant below, a citizen of Vermont, in the United States District Court for the District of Vermont sitting at Montpelier, on the verdict of a jury, for damages

for personal injuries resulting from respondent's negligence in driving an automobile in which petitioner was a passenger, at Rockingham, Vermont.

In view of the "guest-occupant" law of Vermont (Section 5113 of the Public Laws of Vermont, 1933, quoted below*) petitioner could recover only if respondent was grossly negligent.

At the conclusion of the evidence, the respondent had moved for a directed verdict. The Circuit Court of Appeals for the Second Circuit, in the decision now sought to be reviewed (R. 184), held that the jury had before them sufficient evidence to hold that respondent was negligent but not that he was grossly negligent, and therefore that a verdict for respondent should have been directed. Having so decided, the Circuit Court of Appeals reversed, and remanded the cause, not for a new trial, but for the entry of final judgment for defendant, though no motion for a judgment despite the verdict had been made nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by the motion for a directed verdict.

Petitioner recognizes that in some cases evidence sufficient to take the issue of negligence to the jury may fall short of that sufficient to prove gross negligence so that a directed verdict is proper, but the settled rule is that on such motions the evidence should be viewed in the light most favorable to plaintiff. The Circuit Court of Appeals did not mention this rule but violated it and invaded the province of the jury. Petitioner further concedes that an overruled point that a verdict should have been directed

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*Sec. 5113; LIABILITY OF OPERATORS TO GUEST OCCUPANTS; EXCEPTIONS. The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of such vehicle unless such owner or operator has received or contracted to receive pay for the carriage of such occupant, or unless such injuries are caused by the gross or wilful negligence of the operator.

may be saved and renewed by a motion for judgment. But this was not done here. The result,—the order for the entry of judgment contrary to the verdict,—deprives petitioner of her right of trial by jury, contrary to the Seventh Amendment.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version of the accident different from that which it may be fairly assumed the jury believed. The testimony tended to show the following facts, many of which, it will be noted from the record references, are accepted by the Circuit Court of Appeals:

On August 27, 1936, petitioner was riding as a guest passenger in the automobile of respondent from North Walpole, New Hampshire, bound for Rockingham, Vermont. Respondent's automobile collided with an automobile driven by one Ralph A. Wilson, of Rockingham, Vermont, who was bound in the opposite direction. Respondent was driving down hill (9% grade, R. 37, 182) on a narrow dirt and gravel road, a public highway, (R. 39, 129, 132, 138) around a sharp curve to the left (R. 36, 130, 37, 182; 60° or 70° angle, R. 41, 181) on the left or wrong side of the center of the road (R. 101, 181) approaching the Southerly end of the Williams River Bridge, which was a narrow covered bridge (R. 181, 47, 107), with his view obscured by the curve in the road and by bushes which lined the left side of the road (R. 104, 105, 137) until within two car lengths of the Southerly entrance to the bridge. The collision occurred about twenty feet from this end of the bridge (R. 181).

The other automobile driven by Wilson was approaching across the bridge and emerging from it prudently in second gear (R. 105) at a pace of not exceeding two miles an hour (R. 114), as the jury may be presumed to have found upon the evidence, though respondent attributed to Wilson much greater speed (R. 146, 149) and the Circuit Court of Appeals rejected two miles an hour as incredible (R. 182). Wilson had as a precaution blown his horn upon entering

and again before emerging from the South end of the bridge (R. 58, 100, 101, 102, 182) and was on the far right of the roadway of the bridge and the far right of the road as it curved from the exit of the bridge, close to the guard rail at the point of the accident (R. 67, 101, 147, 148).

Respondent was well acquainted with the curve, at the point of accident (R. 183) having much traveled there (R. 133, 137, 138, 140), passing other cars there on other prior occasions (R. 140). He well knew the danger of meeting another car and well knew he could not safely pass any moving car at this point unless he were travelling at "a snail's pace" (R. 140, 141, 183). He also well knew that on previous occasions he had been required to stop completely at that point to permit other automobiles to pass safely (R. 140); he knew he was travelling faster than a "snail's pace" (R. 141), that the road was narrow (R. 140, 104, 36, 120), that the easterly shoulder of the outer curve was inclined to be wet (R. 132); he did not slow the car speed (R. 141) until too late to avoid the collision (R. 182) although he knew that other cars might be travelling at this point at the time (R. 138).

Petitioner could not drive an automobile, and though she was asked, she could not estimate respondent's speed. Petitioner could only say there was an "awful crash" (R. 67). There was testimony as to comparative speed for consideration by the jury in the fact that the left front of respondent's Ford struck the left front of Wilson's Dodge with such force as to drive it backward through the guard rail, breaking it, at the (respondent's left) inside of the curve (R. 102, 104). Respondent undertook to estimate his speed in miles per hour, and he said it was fifteen (R. 140, 141). The Circuit Court of Appeals accepted this testimony as correct (R. 182, remarking cryptically and mistakenly that there was "curiously enough no dispute" about this), though as above noted it rejected Wilson's testimony that he was going not over two miles an hour. From respondent's point of view, Wilson's apparent speed would be of

course the sum of respondent's speed plus Wilson's speed. Respondent's own testimony (repeated) that he saw Wilson's car "shoot out" in front of him (R. 147) and his insistence, contrary to Wilson's testimony, that Wilson was going fast (R. 146, 149) is therefore evidence of his own excessive speed. However, any inference from circumstances is less important, because the jury heard direct contradiction of respondent's testimony as to his speed. Wilson testified that respondent's speed was more than fifteen miles an hour (R. 114). The Circuit Court of Appeals' assumption that no jury could properly find that respondent's speed exceeded that admitted and its statement that there was no dispute are clear errors. And, though it mistakenly brushed Wilson's speed aside as immaterial (R. 182), its decision was plainly enough based on its conclusion about respondent's speed (R. 184).

The testimony as to these facts was taken before the trial judge and jury during the three days, August 1 to August 3, 1939. At the close of the evidence, the respondent moved the Court to direct a verdict in his favor on the ground that the evidence did not establish gross negligence on his part nor raise a question upon which the minds of reasonable men might differ, as gross negligence is defined in the Vermont cases; the motion was overruled (R. 156). The District Judge submitted a copy of his proposed charge to the jury to counsel; and counsel for petitioner and respondent, respectively, submitted their requests in the form of proposed changes in the Court's charge (R. 157, 158).

The issues were given to the jury the following day, August 4, 1939, by a charge by the District Court which distinguished between ordinary and gross negligence and defined the latter in manner consistent with the Vermont cases, and no question has been made as to the correctness or sufficiency of the Court's charge in this regard (R. 162). After their initial consideration of the case, the jury returned to the courtroom and requested that they be given and were given further instructions by way of definition

and illustration of gross negligence, as to which further instructions no question arises (R. 163). After further consideration, the jury found for the plaintiff and assessed damages. Judgment was thereupon, without the interposition of any objection, entered for the petitioner upon the verdict, August 4, 1939 (R. 165, 167).

Rule 50(b) of the Federal Rules of Civil Procedure is quoted in the margin.*

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The only indication in the record of the possible expectation of respondent as to the future of the cause is in the fact that in a stipulation providing for the omission from the record of evidence relating to damages, this was recited to be without prejudicing the rights of the respondent upon

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**Rules of Civil Procedure for the District Courts of the United States:* Rule 50(b). "Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

any subsequent trial to contest the amount, character and extent of the damages claimed to have been suffered by the petitioner (R. 173).

There was no indication in these proceedings looking to an appeal that respondent was seeking in the Circuit Court of Appeals anything other than a conventional reversal and new trial.

Respondent's brief in the Circuit Court of Appeals is, of course, not a part of this record, but it seems not improper to mention and will doubtless be conceded by respondent that it contains no argument or request for the entry of a judgment for respondent notwithstanding the verdict and concludes with the conventional prayer that the judgment of the lower court "be reversed" without more.

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case, not for a new trial, but with instructions to enter final judgment for the defendant (R. 181, 185).

This opinion, in effect, was that the difference between ordinary negligence and gross negligence is a matter of degree concerning which there is no universally applicable formula but that each case must be separately considered upon its own facts. The court recited its version of the facts and found they constituted only ordinary negligence. The facts which the court found could have been found by the jury on the testimony. It certainly can not be said, however, that the facts which the Court found were those most favorable to the plaintiff which could be founded upon the testimony. It certainly has been the long settled law that the verdict of a jury is not to be directed, or upset, unless the latter is true.

The only justification given by the Circuit Court of Appeals for its invasion of the province of the jury with respect to the credibility of the testimony is its remark that the issue as to Wilson's speed was not important as it did not count in determining respondent's negligence (R. 182). The Court does not notice that respondent O'Brien himself

expressed the more natural view that it took greater negligence to produce a collision with a slow moving car than with one approaching rapidly around this blind curve, and defended himself by attributing a rapid speed to Wilson's car (R. 146, 147, 149).

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted. The learned Court cites in support of this position cases in the Third and Eighth Circuit in each of which, however, the litigant in the position of the respondent had availed himself of the permission given by rule 50 (b) and made the motion contemplated by that Rule in the District Court. These cases and the Court's reasoning are more fully discussed in the brief in support hereof (pp. 25, 26).

B. THE BASIS OF THE COURT'S JURISDICTION.

It is competent for this Court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

C. THE QUESTIONS PRESENTED.

Two separate and wholly independent questions are presented.

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find the respondent to be guilty of gross negligence, principally by disregarding as incredible, testimony which the jury may

have believed as to the speed of Wilson's car and accepting as conclusive testimony of respondent as to his own speed, which in the light of other evidence, the jury may not have believed, thus usurping the functions of the jury by invading their exclusive province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to found a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

D. THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. It is important, in order that trial by jury may be preserved as intended by the Seventh Amendment, that this Court shall determine whether a Circuit Court of Appeals may determine that a verdict should have been directed, by finding facts (and determining that they do not constitute gross negligence) which are less favorable to petitioner

than those which might have been found by the jury on the evidence.

2. The decision sought to be reviewed determined a novel and important question arising under Rule 50 (b) of the new Federal rules in a way probably in conflict with the decision of this Court, *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 395, which dealt with the State practice after which this rule was modelled.

Other Circuit Courts of Appeal which have reviewed motions for judgments contrary to verdicts made in District courts pursuant to this Rule 50 (b), have plainly implied that they consider the making of such motions in the District Court after verdict as provided by the Rule and actions by the District Court granting or refusing such motions, to be indispensable to affirmance or reversal of the actions of the District Court on such motions. (See brief in support here, p. 26.)

This new rule provides an instrumentality by which, without loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be reexamined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660) "came to be supported on the theory that it gave better opportunity for considered rulings." It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better oportunity" to make the ruling in advance of the appeal. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which

oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad. In any event, the decision of this Court in *Aetna Insurance Co.* v. *Kennedy* (*supra*), indicated that a failure to make an appropriate motion in the trial court would be an insuperable bar to the entry by the Appellate Court of judgment other than for new trial.

A kindred question arising under Federal Rules 50 and 59 is about to be considered by this Court, certiorari having been granted April 8, 1940 (60 Sup. Ct. 809, the case below being *Duncan* v. *Montgomery Ward & Co.*, 108 F. (2d) 848), the kindred question being whether a new trial may be directed by the Circuit Court of Appeals on the reversal of a judgment *non obstante veredicto* entered upon motion to that effect duly made in the District Court, coupled with a motion for a new trial made in such form as to raise a question whether it remained in the case after the grant of the motion for judgment *non obstante veredicto*.

Since the promulgation of the new rules, the understanding of the bar generally has been that to invoke the provisions of Rule 50 (b) in this regard, it is necessary for a party against whom a jury has found to make subsequent to a verdict a motion to vacate the verdict and judgment and to have contrary judgment entered. The making of such motions is mentioned in all of the reported cases to date arising under this rule with the exception only of the case at bar and a case decided a few days thereafter by the Circuit Court of Appeals for the Second Circuit, on the authority of the case at bar, *Limbershaft Sales Corporation* v. *A. G. Spalding & Bros.*, 111 Fed. (2d) Advance Sheets 675. If motions being made by the bar generally need not be made, and if it is not necessary to give one's opponent a day in Court on such motions in the District Court, before invoking final action by the Appellate Court as though such motions had been made in the District Court, such a construction of the Federal Rule and departure

from the principles heretofore settled by this Court in respect of the prior similar practice, is important and should be settled by this Court.

WHEREFORE, the petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case entitled *Margaret Conway, Plaintiff-Appellee,* v. *George H. O'Brien, Defendant-Appellant,* No. 287, in order that said case may be reviewed and determined by this Honorable Court.

MARGARET CONWAY,

By HERBERT G. BARBER,
FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,
JEROME F. BARNARD,
1422 F Street, N. W.,
Washington, D. C.
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term 1940.

No.——

MARGARET CONWAY, *Petitioner,*

vs.

GEORGE H. O'BRIEN, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

REFERENCE TO REPORT OF OPINION BELOW.

This case in the District Court was not reported. In the Circuit Court of Appeals for the Second Circuit it is reported in 111 F. (2d) Advance Sheets 611.

GROUNDS OF JURISDICTION.

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

STATEMENT OF THE CASE.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in the petition in support of which this brief is filed.

ERRORS TO BE URGED.

(1) The court erred in finding error in the submission of case to the jury on the issue of gross negligence by assuming the facts less favorable to plaintiff-petitioner than the jury could find from the evidence.

(2) The Court erred, having found error in the submission of the case to the jury, in directing the entry of judgment for defendant-respondent instead if new trial.

SUMMARY OF ARGUMENT.

I. The Circuit Court of Appeals Erred in Holding That the District Court Erred in Not Directing a Verdict for Respondent.

Upon admitted facts, if reasonable men might differ as to whether the negligence was gross, the question was for the jury. Here facts were in dispute upon which the degree of negligence depended and facts were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury but the point must by some appropriate means be submitted to the trial judge after verdict and be by the trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities, is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50 (b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found, if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Under the similar prior practice following state practice this court has decided a motion for judgment non obstante veredicto, acted upon by the District Court, is essential to found an affirmance or reversal of such action by the Circuit Court of Appeals.

The opinions of Circuits other than the Second imply that such a motion is essential under Rule 50 (b). The general practice and opinion at the bar is in accord.

ARGUMENT.

I. The Circuit Court of Appeals Erred in Holding That the District Court Erred in Not Directing a Verdict for Respondent.

The Circuit Court of Appeals erred in finding that Wilson's automobile with which respondent collided, was not approaching as slowly as he testified, not over two miles an hour, and that respondent's automobile was going only fifteen miles an hour as respondent testified, contrary to the circumstances and to the direct testimony of Wilson. Both these facts were material in the question of gross negligence. The Circuit Court of Appeals concedes that respondent's speed was material, for the opinion where it concludes that only a "routine dereliction" had been proven, states (R. 184):

> "Had he (respondent) been driving twice as fast * * * we might think otherwise."

The jury, having returned a verdict for plaintiff under instructions which properly defined gross negligence, must be presumed to have found the facts most favorable to the plaintiff. It must be presumed to have found excessive speed on the part of the respondent which, with the other circumstances, made it practically impossible for respondent to avoid collision with a car approaching so slowly as to be comparatively stationary on its own side of the road. If the facts were as the jury may on the evidence have believed them to be, gross negligence was proven.

The remark of the Circuit Court of Appeals above quoted is a practical admission of this. It may therefore be unnecessary (as it does not directly bear upon the point we press here) to point out that the Vermont decisions differentiate between "momentary inattention, error of judgment or loss of presence of mind," on the one hand, and the driving of a car before the emergency arises so fast, or so in disregard of lack of vision or of other

possible traffic, as to constitute a more deliberate or continuing disregard of known danger; on the other hand. The former is ordinary negligence, the latter may be gross. In *Powers* v. *Lackey,* 109 Vt. 505, the lack of visibility was caused by fog, here by the turn and bushes, and in both the driver was on the left of the road, and in the case cited the above distinction was made. It is repeated in almost the same words in cases relied on by both sides, such as *Anderson* v. *Olson,* 106 Vt. 70, 72, *Kelley* v. *Anthony,* Vermont, 1939, not yet officially reported, 8 Atl. (2d) 641. In the latter case the Court said:

> "The roads in this state are filled with curves of varying degrees. To enter some of them at the speed and in the manner indicated by the evidence might well warrant a submission of the issue in question and this would be particularly so in cases of accidents resulting from approaching traffic."

The District Court's instructions to the jury (R. 159) closely followed *Shaw, Admr.* v. *Moore,* 104 Vt. 529, 86 A. L. R. 1139.

Even if the facts were as assumed by the Circuit Court of Appeals, the issue of gross negligence properly went to the jury. Even fifteen miles an hour at that place on the wrong side of the road, driving into the unseen where other cars might lawfully be approaching and where the danger was fully known to the driver, is not so clearly only ordinary negligence that a jury may not find it gross. The twelve Vermont men from the vicinity thought the negligence was gross. The trial judge thought the evidence sufficient to submit. The point of view of a New York City judge, accustomed to broad highways where when traffic proceeds at all the road is designed to make fifty miles an hour safe, should not control as to what is only ordinary negligence on this kind of a Vermont road. It is natural that fifteen miles an hour on a country road would seem slower to a city man than to the Vermont jury.

This court in *The Richmond & Danville R. R. Co.* v. *Powers*, 149 U. S. 43, 45, said:

> "It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

But in the instant case, not only were the conclusions to be drawn from undisputed facts in dispute, but the facts themselves. The Circuit Court of Appeals has undertaken to weigh the evidence and pass on credibility, and to resolve disputed facts bearing on negligence against the contentions and evidence sustaining the party for whom the jury found.

This is such a departure "from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." (Rule 38, 5 (b)).

This Court said in *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 253, 258:

> "The testimony shows, and, in deciding a question of this character, the view must be taken of it most favorable to the plaintiff, that he was * * *"
>
> "Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish'. Gardner v. Michigan C. R. Co. 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

What has just been quoted is quoted as "too well settled in the federal practice to admit of serious controversy" by the Circuit Court of Appeals for the Fourth Circuit in

Atlantic Coast Line R. Co. v. *Linstedt*, 184 F. 36, 42, decided in 1910.

The Circuit Court of Appeals for the Seventh Circuit says tersely in *Payne* v. *Colvin*, 276 F. 15, 16, decided in 1921, "Weight and credibility are not reviewable."

The Circuit Court of Appeals for the First Circuit, in *Heisson* v. *Dickinson*, 35 F. (2d) 270, 271, decided in 1929,

> "Upon questions of negligence, a case should not be withdrawn from the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts which the evidence tends to establish."

The Circuit Court of Appeals for the Second Circuit, the court of the case at bar, in *Miller* v. *Erickson*, 76 F. (2d) 598, 599, decided April 1, 1935, said:

> "The judgment against Erickson appears to us justified. He was driving a motorcar at a speed of at least twenty-five miles an hour through a village at night in a thick snowstorm, when by his own statement he could not see ahead more than sixty or seventy feet. That meant that he had less than two seconds in which to stop. He struck a car at rest with its tail light on, and drove it forward twenty feet. 'Gross negligence,' as the courts of Vermont have construed it, means in substance that the defendant conducts himself with utter recklessnes of the safety of others. A jury might well believe that Erickson had done so. We think so ourselves."

The same court, in *Tompkins* v. *Erie R. Co.*, 90 F. (2d) 603, 605, where the facts relied on to prove contributory negligence were to the extent referred to in what we quote, undisputed, the court cited this court's decision in *Richmond & Danville R. Co.* v. *Powers, supra*, to the statement:

> "To us it would seem imprudent to walk, or even to stand, in the dark within a foot of a train moving at the rate of 10 miles an hour; but the fact that recoveries have been allowed under closely similar circumstances

in the cases above cited indicates that fair-minded men may hold a different view. This is enough to preclude taking the issue from the jury."

The Circuit Court of Appeals for the Eighth Circuit, in *Ocean Accident & G. Corp.* v. *Moore,* 85 F. (2d) 369, 370, decided August 13, 1936, said:

> "We do not weigh the evidence, but under the well-settled rule consider the evidence from the standpoint most favorable to the plaintiff because all disputed questions of evidence have been resolved by the verdict of the jury against defendant."

There are no decisions to the contrary. The invasion by the court below of the exclusive province of the jury to weigh conflicting evidence and to decide its credibility was, we believe, inadvertent. That fact, however, does not alter the petitioner's rights, nor does it diminish petitioner's expectation that a principle so well settled in this court will be reaffirmed by a review of the decision in this respect as well as in respect to the important and independent ground yet to be discussed.

As this court said in *Dimick* v. *Schiedt,* 293 U. S. 474, 486:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred in Directing Judgment Notwithstanding the Verdict Instead of Directing a New Trial.

1. The decisions of this Court which led to the adoption of Federal Rule 50 (b) show that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the issue of gross negligence, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court make.

New Federal Rule 50(b) makes universally possible in federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a federal rule. He discusses the manner by which sufficiencies of evidence have been challenged in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a

judgment *non obstante veredicto,* a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance remains the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and a new trial, unless means are taken to bring the matter into the record for disposition by the judge after the trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

2. Rule 50 (b) contemplates motions for judgments notwithstanding verdicts.

The Federal Rule 50(b) is merely an instrumentality to accomplish the reform which had been local to the states, notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below

should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line,* v. *Redman, supra,* 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's oportunity for consideration of the sufficiency of the evidence was as good and as unhurried before the rule as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

3. This Court has decided that the prior approved practice required motions for judgments notwithstanding verdicts.

The question above discussed has been decided by this court as if arose under the prior analagous state practice. This court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy,* 301 U. S. 389, 392, 394-395. The point appears from the following from this Court's opinion:

> "The court refused to direct for plaintiff or defendants and, without reserving for later consideration

the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."

* * * "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

4. The Court below fails in its attempted explanation of its disregard of the requirement of a motion and action in the Court below.

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying that it was not necessary that the trial court should deny "the motion once again" (R. 184).

The Court's expression was inaccurate. "The motion" the District Court had denied was for a directed verdict, made in the course of the trial. "The motion" which was

neither made nor denied was one, in the words of this rule, "to have judgment entered in accordance with his motion for a directed verdict." Something "in acordance with" another thing is not the thing with which it is in accordance. The Circuit Court continued "his (the District Judge's) failure to vacate his first order is enough." It is respectfully disputed that the absence of something from the record, expressed as a "failure" to vacate an order, is equivalent to an order denying a motion not made, on which to predicate error.

5. Other Circuit Courts of Appeal have implied that motions for judgments notwithstanding verdicts are necessary to the granting of such judgments on appeal.

The Court cites in support of its elision of the necessity for consideration and action by the District Court on such a motion for judgment *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 74, C. C. A. 3, and *Massachusetts Protective Ass'n.* v. *Mouber*, 110 F. (2d) Adv. Sheets, 203, 204, 207, C. C. A. 8. In the former case the Court said, page 74:

> "The appellants filed motions to set aside the verdict and judgment and moved for a new trial. These motions were denied by the trial judge and the present appeal was taken."

In the latter case the Court said, pages 204, 207.:

> "The court denied the motion, and the jury returned a verdict for plaintiff. Thereafter, within ten days, pursuant to Rule 50 (b) * * * the defendant moved to set aside the judgment and verdict for plaintiff and for the entry of judgment in its favor upon the same grounds as were urged in support of its motion for a directed verdict. The court overruled this motion for judgment notwithstanding the verdict." * * *
>
> "The plaintiff argues that if there is a reversal, the case should be sent back for a new trial—citing Slocum v. New York Life Ins. Co., 228 U. S. 364. Under the rule announced by the Supreme Court of the United

States in Baltimore & C. Line, Inc. v. Redman, 295 U. S. 654, as implemented by Rule 50 (b) * * * the defendant, we think, is entitled to have judgment entered in its favor, the court below having erred in denying the defendant's motion for a directed verdict, and having also erred in not granting judgment notwithstanding the verdict."

It is respectfully submitted that neither of the cases cited by the court as precedents for considering the motion for judgment contemplated by Rule 50 (b) as unnecessary to a direction for judgment by the appellate court, sustains the proposition, but rather the contrary.

Evidencing or at least implying a view contrary to that of the Second Circuit, we cite from other circuits the following additional recent cases:

Ferro Concrete Const. Co. v. *United States,* 112 F. (2d) Advance Sheets, 488, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

Lowden v. *Denton,* 110 F. (2d), Advance Sheets, 274, 278, C. C. A. 8, where the court said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule (50(b)) of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

Reliance Life Ins. Co. v. *Burgess,* 112 F. (2d) Advance Sheets, 234, 240, C. C. A. 8, where the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for

the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Assn. v. Mouber, 8 Cir., 110 F. 2d 203; Lowden v. Denton, 8 Cir. 110 F. 2d 274."

Pruitt v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) Advance Sheets 140, 143, C. C. A. 5.

6. The Bar generally has assumed that motions for judgments notwithstanding verdicts are desirable and necessary to the granting of such judgments.

Not only does this appear from the Circuit Court of Appeals cases cited under the last heading but also from the District Court reports. Recent cases are:

Blue Bird Taxi Corporation v. *American Fidelity & Casualty Co.*, 26 Fed. Supp. 808, 810, Dist. Ct. E. D. South Carolina, where the court said:

> "At the conclusion of the testimony, defense counsel moved for a directed verdict.
>
> * * * * *
>
> "The jury was discharged from further consideration of the case in order that the court might further consider the effect of the Tyger River Co. decision, and the relation of the case at bar to the facts there. This action was taken under the provisions of Rule 50 (b) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and within ten days thereafter, counsel for the defendant indemnity company moved for judgment in accordance with its motion for a directed verdict."

Cline v. *Southern Ry. Co.*, 31 Fed. Supp. Advance Sheets 657, District Ct. M. D. North Carolina.

Johnson v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. Advance Sheets 176, 179, Dist. Ct. E. D. Tennessee, S. D.

No cases arising under the Federal Rule 50(b) have been found indicating that a motion in the nature of a motion for judgment notwithstanding the verdict is unnecessary in order to predicate error on the failure to enter such judg-

ment, excepting the case at bar and a case following and citing it, in the Second Circuit, *Limbershaft Sales Corporation* v. *A. G. Spalding & Bros.*, 111 F. (2d) Advance Sheets 675, 678.

The proper practice, as we see it, is very simply stated by District Judge W. Calvin Chestnut as reported in the Washington and New York 1938 Proceedings of Institutes, Federal Rules of Civil Procedure, American Bar Association, at pages 86 to 87; also by former Attorney General Mitchell who refers to the submission of the draft of this rule to this court, at pages 282 to 284 of this volume.

The practical advantage to the parties in having the motion for judgment *non obstante veredicto* made and considered in the trial court, where the alternative action permitted by the rule is new trial, and where only this discretion can be wisely exercised, is well discussed by Circuit Court Judge Sibley of the 5th Circuit in *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co., supra,* 112 F. (2d) Advance Sheets 140, 143. See also on this point *Pessagno* v. *Euclid Investment Company,* 68 Washington Law Reporter 753, decided June 15, 1940, by the U. S. Circuit Court of Appeals for the District of Columbia, where a conclusion apparently opposite to that of *Duncan* v. *Montgomery Ward, & Co.*, 108 F. (2d) 848, certiorari granted April 8, 1940, 60 Sup. Ct. 809, was arrived at, construing Federal Rules 50 (b) and 59.

CONCLUSION.

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed, in holding that the District Court erred in not directing a verdict for the respondent, and in directing a judgment notwithstanding the verdict instead of directing a new trial, are such as to call for review and determination by this Honorable Court.

Respectfully submitted,

HERBERT G. BARBER,

FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,

JEROME F. BARNARD,
1422 F Street N. W.
Washington, D. C.
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 344.

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HERBERT G. BARBER,
FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,
JEROME F. BARNARD,
1422 F Street, N. W.,
Washington, D. C.
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

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MARGARET CONWAY, *Petitioner*,

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In respondent's brief (p. 7) it is said that the opinion in *Lowden* v. *Denton*, 110 F. 2d 274, does not sustain the point to which the case is cited by petitioner. Such a suggestion requires reply.

The point to which this and cases from several other circuits were cited (our brief, p. 27) was that where judgments contrary to verdicts have been ordered by Circuit Courts of Appeal, there had been motions for such judgments within ten days after the verdict in accordance with Rule 50 (b). Respondent says that the procedure in *Lowden* v. *Denton* might have been similar to that followed by the respondent in the case at bar, in which event the case would not support petitioner's contention, the respondent basing his contention on the fact that the reported opinion does not indi-

cate what motions were filed by the defendants in the cited case.

Certiorari was applied for in *Lowden* v. *Denton* upon a ground not relevant to the present case, and the transcript of record was filed May 7, 1940, in this Court as Case No. 984 of the October 1939 Term. The record shows that the motions defendants had filed in that case were a motion for directed verdict at the close of the plaintiff's case (R. No. 984, p. 100), a motion for directed verdict at the close of all the evidence (id. 149), and a motion to have the verdict set aside and to have judgment entered for the defendants in accordance with the motion for directed verdict, filed within six days after the verdict (id. 11). The last mentioned motion is in the words of Rule 50 (b) and is undoubtedly what the Circuit Court of Appeals referred to when it said "the defendants have meticulously complied with the provisions of this rule." There were proceedings in the appellate court which are interesting but not directly relevant.*

It is respectfully submitted that it does affirmatively appear that the procedure approved in *Lowden* v. *Denton* was essentially different from that followed by the respondent in the case at bar in that the defendants therein did make

*The Circuit Court of Appeals had first filed an opinion February 28, 1940, directing a new trial, rejecting defendants' contention that final judgment should be directed for them upon the ground that their motion for directed verdict was denied without reservation and the verdict accepted unconditionally (id. 243). Defendant appellants moved March 7, 1940, to modify the opinion and judgment so that it would direct final judgment for them (id. 211). Plaintiff appellee resisted the motion upon the ground that practice under Rule 50 (b) should follow state practice to the effect that only a new trial and not final judgment should be ordered unless the appellate court was fully convinced that plaintiff could not make out a better case on retrial, citing cases to that effect (id. 235). The Court of Appeals, however, granted the motion and after quoting the rule and disposing of the contention that it was necessary to take a verdict conditionally and holding that no express reservation is necessary under the rule, proceeded to order final judgment for the defendant by the sentence quoted in our original brief (p. 27) upon the ground that the defendants had meticulously complied with the provisions of Rule 50 (b).

the motion for judgment notwithstanding verdict in the lower court which is essential to a claim of error on its denial. Therefore, *Lowden* v. *Denton* was properly cited as an example from the Eighth Circuit of the approval of the procedure which has been followed in all circuits excepting the Second Circuit from which will come the case at bar if certiorari is granted.

Respondent (brief, p. 7) cites also to the same point, viz., that the motion authorized by Rule 50 (b) is not necessary, *Demers* v. *Railway Express Agency*, CCA 1, 108 F. 2d 107. This case was one in which the entry of a judgment notwithstanding the verdict was affirmed. The proceedings in the District Court do not appear in the opinion, but counsel inform us the record (No. 3494 CCA 1, and No. 7272 District Court) shows a motion by defendant for directed verdict, not granted, a verdict for plaintiff December 23, 1938, and a motion by defendant December 28, 1938, that the verdict be set aside and judgment for defendant be entered in accordance with the prior motion for directed verdict, which latter motion was granted. It was the judgment so entered by the District Court which was affirmed by the Circuit Court of Appeals in the decision respondent mistakenly cites to support his contention that the motion for judgment notwithstanding the verdict is not necessary.

On the other point made by petitioner, viz., that the Circuit Court of Appeals erroneously assumed to be true facts upon which there was contradictory testimony, respondent's brief contends that petitioner is asking this Court to "make an extended review of the evidence and the inferences to be derived therefrom" (pp. 4-5). It requires no extended review of the evidence by this Court to verify the fact that there was testimony contrary to the version of the facts accepted as true by the Circuit Court of Appeals on the important issues of the respective speeds of the colliding cars. Petitioner is not seeking to have this Court determine what

the truth was, but only that there was contradiction in the evidence on these points where the Court of Appeals asserted there was none (petition, pp. 3-5; brief, pp. 17-19). In view of the record references given in the petition to the contradiction of respondent's testimony as to his own speed (petition, p. 5), it is surprising to find in respondent's brief a repetition of his reference to his own testimony as "uncontradicted" (respondent's brief, p. 4).

Respectfully submitted,

HERBERT G. BARBER,
FENTON E. BATTON,
Brattleboro, Vermont.

PAUL E. LESH,
JEROME F. BARNARD,
1422 F Street, N. W.,
Washington, D. C.
Counsel for Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

Docket No. 344

MARGARET CONWAY,

Petitioner

V.

GEORGE H. O'BRIEN,

Respondent

MOTION TO DISMISS WRIT OF CERTIORARI OR AFFIRM JUDGMENT

Now comes George H. O'Brien, the respondent in the above entitled cause by Fenton, Wing & Morse, Esqs., and Edwin W. Lawrence, Esq., his attorneys, and moves the Court that the petitioner's writ of certiorari in said cause be dismissed, or that the judgment of the Circuit Court of Appeals for the Second Circuit be affirmed for the following reasons:

The said petitioner has failed to file a brief with this Honorable Court as required by Rule 27 of the Revised Rules of the Supreme Court of the United States.

Portland Company v. United States, 15 *Wall.* 1.

Dated at City of Rutland, in the County of Rutland and State of Vermont the 30th day of December A. D. 1940.

GEORGE H. O'BRIEN

By FENTON, WING & MORSE
Fenton, Wing & Morse,
Mead Building,
Rutland, Vt.

EDWIN W. LAWRENCE
Edwin W. Lawrence,
Merchants Row,
Rutland, Vt.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FENTON, WING & MORSE,
Mead Building,
Rutland, Vermont.
Attorneys for Respondent.

EDWIN W. LAWRENCE,
Merchants Row,
Rutland, Vermont.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner,*

v.

GEORGE H. O'BRIEN, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit requesting that a judgment of that court reversing a judgment rendered for the petitioner by the United States District Court for the District of Vermont and ordering that the petitioner's complaint be dismissed, be reviewed and finally determined by this Court.

Petitioner's "Summary Statement of the Matter Involved" is somewhat more argumentative than is consistent with good practice, and contains much that might more properly have been reserved for inclusion in such brief as she will file if her Petition is granted. For the purposes of this petition however, it may be taken as fairly setting forth the questions presented by this Petition.

Petitioner relies only upon two alleged errors as a basis for her petition to this Court. The first is, in substance, that the Circuit Court of Appeals erred in reversing the judgment of the District Court for its error in denying respondent's (defendant-appellant below) motion at the close of all of the evidence for a directed verdict. The other ground is that the Circuit Court of Appeals erroneously ordered that the complaint be dismissed and final judgment rendered for Respondent, instead of merely reversing the judgment and directing that a new trial be had.

Respondent will be prepared, if the occasion arises, to demonstrate that in neither of the respects relied upon by Petitioner was the Circuit Court of Appeals in error. He will confine himself in this brief, however, to showing that Petitioner has failed to set forth sufficient grounds to warrant the granting of the relief requested.

SUMMARY OF ARGUMENT

I. The alleged error of the Circuit Court of Appeals in holding that the District Court erred in failing to direct a verdict for Respondent is insufficient to warrant granting Petitioner's petition.

The decision of the Circuit Court of Appeals in this case is not in conflict with the decision of another Circuit Court of Appeals upon the same subject matter, is not in conflict with applicable local decisions and is not so radical a departure from the usual course of judicial proceedings as to warrant an exercise of this Court's power of Supervision.

Petitioner seeks only an extended review of the evidence and of the inferences to be derived therefrom.

II. The alleged error of the Circuit Court of Appeals in reversing the judgment of the District Court and rendering final judgment for the Respondent is insufficient to warrant the granting of Petitioner's petition.

Petitioner has failed to show that the decision of the Circuit Court of Appeals is in conflict with the decisions of this or any other Court of the United States or is so radical a departure from the usual course of judicial proceedings as to warrant an exercise by this Court of its power of supervision.

ARGUMENT

I. The alleged error of the Circuit Court of Appeals in holding that the District Court erred in failing to direct a verdict for Respondent is insufficient to warrant granting this Petition.

When it is reduced to its simplest elements, Petitioner's first ground of complaint appears to be that the Circuit Court of Appeals grossly erred in failing to accept as true the statement of the witness Wilson that he, Wilson, was traveling at a speed of only two miles per hour (R. pp. 114, 182) and in accepting as true the statement of the respondent, O'Brien, that he was traveling at only fifteen miles per hour as he approached the point where the collision occurred (R. pp. 140, 141, 182). The obvious and sensible answer to the first contention was given by the Circuit Court of Appeals in its opinion when it stated that the speed at which the Wilson car was traveling was immaterial to the main issue in the case, i.e., whether there was sufficient evidence that Respondent O'Brien was guilty of gross negligence to warrant submission of the case to the jury. Thus it is apparent that any error by the Circuit Court of Appeals in this respect was entirely harmless.

With reference to any challenged error on the part of the Circuit Court of Appeals in failing to view in the light most favorable to the petitioner (Plaintiff-Appellee below) the evidence with respect to the speed of the car of Respondent (Defendant-Appellant below) it is respectfully urged that

any inferences to be derived from the evidence that the collision broke a guard rail and the testimony of the petitioner that an "awful crash" resulted from the collision (R. pp. 67, 102, 104, fols. 201, 305, 311, 312) would be so largely matters of speculation and conjecture as to be insufficient as a basis for disregarding the uncontradicted testimony of the Respondent. There was no error in accepting Respondent's testimony that he was traveling at only fifteen miles per hour as he approached the point of collision.

No question is made by the petitioner in her brief but that the Circuit Court of Appeals, in its effort to "set a quantitative standard for the measurement of incommensurable factors" (R. p. 182) in anywise violated or deviated from the established rules concerning and definitions of "gross negligence" as expounded in *Shaw, Adm'r v. Moore*, 104 *Vt.* 529, 162 *Atl.* 373, 86 *A. L. R.* 1139 and in the other Vermont decisions set forth in the opinion (R. pp. 182, 183, fols. 183-184). Petitioner has not pointed out, and Respondent has been unable to find, any decisions by this Court, or by the Circuit Courts of Appeals of the Second or any other circuits with which the decision in this case would be in conflict, upon the legal questions involved.

As has frequently been stated by the Supreme Court of Vermont, and as was recognized by the Circuit Court of Appeals, there is no hard and fast rule whereby it can be determined with precision whether or not a given course of conduct constitutes "gross negligence" (R. p. 183, fol. 184). Each case must be decided upon its own facts.

> *Rich v. Hall*, 107 *Vt.* 455, 459, 181 *Atl.* 113
> *Powers v. Lackey*, 109 *Vt.* 505, 506, 1 *Atl.* (2*d*) 693
> *Hall v. Royce*, 109 *Vt.* 99, 104, 192 *Atl.* 193.

Respondent submits that in seeking a writ of certiorari in this case, Petitioner does not intend to present to this Court for review a decision which is in conflict with the holdings of any other court or which departs so far from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision. On the contrary, she desires only to have this Court make an extended review of the evidence and the inferences to be derived

therefrom and to determine whether she introduced sufficient evidence before the District Court to justify a submission of the question of the respondent's gross negligence to the jury.

It has been repeatedly held by this court that a writ of certiorari will not be granted to accomplish such a purpose.

Forsyth v. Hammond, 166 *U. S.* 506, 41 *L. ed.* 1095, 1098

Houston Oil Co. of Texas v. Goodrich, et al., 245 *U. S.* 440, 441, 62 *L. ed.* 385

Southern Power Co. v. North Carolina Public Service Com., 263 *U. S.* 508, 62 *L. ed.* 413

United States v. Johnston, 268 *U. S.* 220, 227, 69 *L. ed.* 925, 926

General Talking Pictures Corp. v. Western Electric Corp., 304 *U. S.* 175, 178, 82 *L. ed.* 1273, 1275.

II. The alleged error of the Circuit Court of Appeals in reversing the judgment of the District Court and rendering final judgment for the respondent is insufficient to warrant granting to Petitioner the relief requested.

As set forth by Petitioner in her summary statement of the matter involved, and in her brief, at the close of all of the evidence Respondent moved that a verdict be directed in his favor on the ground that the evidence, viewed in the light most favorable to the plaintiff; did not warrant a finding by the jury that the defendant was guilty of gross negligence (R. p. 156, fols. 467, 468). The motion was denied and Respondent was allowed an exception. No motion for a judgment notwithstanding the verdict or for a new trial was made by the respondent at any time after the rendition of the verdict.

With respect to Petitioner's statement on page 7 of her Petition that Respondent's brief before the Circuit Court of Appeals contained only the request that the judgment of the lower court "be reversed," Respondent is willing to concede that such was the fact. Petitioner will doubtless reciprocate by conceding, if the point is in any way material, that Respondent briefed and argued three exceptions to

various errors on the part of the District Court in addition to his exception to the denial of his motion for a directed verdict. Had any or all of these other exceptions been sustained, the Respondent would only have been entitled to a new trial.

The Circuit Court of Appeals considered only Respondent's exception to the denial of his motion for a directed verdict and found error in denying it. Holding directly that it was unnecessary for Respondent to have filed a new motion after verdict or judgment, the Circuit Court of Appeals decided that it had authority, under Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States, to dismiss the complaint. Judgment was reversed and the complaint dismissed (R. p. 184, fol. 185).

Petitioner claims that the foregoing interpretation of Rule 50(b) and the decision rendered in conformity therewith is in conflict with the decisions of this Court, with the decisions of other Circuit Courts of Appeals and with the established practice on the part of the Bar of the various United States District Courts.

Respondent has studied carefully the majority and dissenting opinions in *Slocum v. New York Life Ins. Co.*, 228 *U. S.* 364, 57 *L. ed.* 879 and the opinion in *Baltimore & Carolina Line, Inc. v. Redman*, 295 *U. S.* 654, 79 *L. ed.* 1636, cited by Petitioner in support of her contention that the decision here under consideration violates established rules of this Court. Respondent submits that the decision in this case in no way conflicts with either the decision or language of either case. On the contrary, no mention can be found in the opinion of this Court in the *Redman Case, supra*, or in the opinion of the Circuit Court of Appeals for the Second Circuit, reported in 70 *Fed.* (2*d*) 635 of any motion having been filed after the motion for a directed verdict. It appears from both opinions that a motion for a directed verdict was filed by the defendant, the case was submitted to the jury under a reservation by the trial judge of his decision on the motion and a verdict rendered for the plaintiff; the trial judge then denied defendant's motion and rendered judgment for the plaintiff. The defendant appealed. It was there held that the appellate court could render final judg-

ment in favor of the defendant. Such procedure, can hardly be considered as inconsistent with the holding in this case.

The case of *Aetna Ins. Co. v. Kennedy*, 301 *U. S.* 389, 81 *L. ed.* 1177, reported below in 87 *Fed.* (2*d*) 683 deals with a question of practice under the laws of Pennsylvania quite unlike the practice established by the new Rules of Civil Procedure. It cannot, in Respondent's opinion, be considered as establishing an interpretation of Rule 50(b) in conflict with the present decision.

The decisions by various Circuit Courts of Appeals cited by Petitioner are equally ineffective to demonstrate any conflict in the decisions of the Courts of the United States which could be eliminated by a decision by this Court upon the point which Petitioner seeks to raise. In all of the cases cited on Pages 26, 27 and 28 of her brief, with the exception of *Lowden v. Denton*, 110 *Fed.* (2*d*) 274, the party whose motion for a directed verdict was denied, filed a motion within the 10 day period prescribed by Rule 50(b) for a judgment notwithstanding the verdict. In each instance the procedure was approved, but there is nothing in any of the opinions to indicate that any court believed that the filing of a motion after verdict or judgment was a condition precedent to the consideration by the appellate court of the questions raised by the motion for a directed verdict or to the rendition by the appellate court of a final judgment in favor of the moving party in the event that error in the denial of the motion was found.

In *Lowden v. Denton, supra*, from which Petitioner quotes on page 27 of her brief, the opinion does not indicate what motions were filed by the defendants referred to. The meticulous compliance with the terms of Rule 50(b), quoted from the opinion, might, for all that appears, have been applied to procedure similar to that followed by the Respondent in this case. See also *Demers v. Railway Express Agency, Inc.* (*CCA*-1), 108 *Fed.* (2*d*) 107.

With respect to the practice of the Bar of the various United States Courts, under Rule 50(b), Respondent submits that the short time during which the new Rules of Civil Procedure have been in effect makes it highly improbable that any widespread practice has grown up which would

be seriously disturbed by the decision of the Circuit Court of Appeals in this case.

In short, although it is possible that this second matter raised by Petitioner as a basis for the granting of a writ of certiorari is an interesting one, Respondent submits that the narrowness of the question when coupled with the apparent lack of conflict in the decisions on it makes it wholly unnecessary that this Court exercise its extraordinary and discretionary power of review.

CONCLUSION

It is respectfully submitted, therefore, that the alleged errors of the Circuit Court of Appeals for the Second Circuit are not such as to call for review and determination by this Honorable Court.

Respectfully submitted,

FENTON, WING & MORSE,
Mead Building,
Rutland, Vermont,
Attorneys for Respondent.

EDWIN W. LAWRENCE,
Merchants Row,
Rutland, Vermont,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

EDWIN W. LAWRENCE,
Merchants Row,
Rutland, Vt.

LEONARD F. WING,
R. CLARKE SMITH,
Mead Building,
Rutland, Vt.
Counsel for Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

STATEMENT

The jury returned a verdict for Plaintiff (Petitioner) to recover Ten Thousand Dollars from the Defendant (Respondent) on account of personal injuries she received while riding in his automobile when it collided with another automobile and judgment was entered by the United States District Court for the District of Vermont accordingly (494, 500).*

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*Figures in parentheses refer to folios of the Record.

Before the case was submitted to the jury, Defendant moved that a verdict be directed in his favor claiming the evidence did not tend to show gross negligence. This motion was denied (467).

The Defendant appealed to the United States Circuit Court of Appeals for the Second Circuit. That Court held that the District Court should have directed a verdict for the Defendant, and acting under Rule 50(b) of the new Rules of Civil Procedure for the District Courts of the United States, ordered that the Plaintiff's complaint be dismissed. (See pages 181-186 of the Record.)

The case is here on certiorari.

Two questions are involved:

(1) Should the Defendant's motion for direction of a verdict have been granted?

(2) Should the Circuit Court of Appeals have remanded for a new trial because the Defendant did not move to have the verdict and judgment set aside?

Plaintiff was a guest occupant of Defendant's car when about 11:30 A.M., August 27, 1936, it met and collided with a car driven by Wilson on a sharp curve on a narrow country road in Vermont where there was little travel and cars going both ways used the same wheel tracks, excepting, of course, when passing. Plaintiff called it a single lane road (289).

Only five or six families lived on the road.

Plaintiff is required to establish gross negligence by Section 5113 of the Public Laws of Vermont, which reads:

> "P. L. 5113. Liability of operators to guest occupants; exceptions. The owner or operator of a motor vehicle shall not be liable in damages for injuries received by any occupant of the same occasioned by reason of the operation of such vehicle unless such owner or operator has received or contracted to receive pay for the carriage of such occupant, or unless such injuries are caused by the gross or wilful negligence of the operator."

As one travels northerly as defendant's car was traveling, the road runs downgrade in an easterly direction along the south side of Williams River (106, 191, 193, 194; Defendant's Exhibit E). The road then turns north through about

a sixty degree angle (106, 107, 109, 110, 123) and crosses Williams River via a covered bridge.

In the vicinity of the place where the accident occurred, the highway is of dirt or gravel surface (114, 115, 194, 271), is about twelve or fourteen feet wide with a hard packed single set of wheel tracks in the center and dirt shoulders on both sides (271, 272, 311, 356, 357) widening somewhat at the curve just before entering the bridge (357).

The bridge near the south end of which the collision occurred is a wooden covered bridge about 115 feet long (157) with solid sides except for short sections on the east and west sides near the south end, which are open except for criss-crossing timbers (105, 135, 136, 138, 139, 130 and Plaintiff's Exhibit 14 and Defendant's Exhibit A). The flooring of the bridge was of planks laid at right angles to the length of the bridge; these planks were about 12 feet 6 inches long so that the traveled way within the bridge was 12 feet 6 inches in width except near the south end where a plank laid lengthwise to the bridge increased the width of the traveled portion to 13 feet 6 inches for a distance of about 12 feet (140, 141, 146, 148, 149).

South of the bridge there were guard rails along both sides of the road very close to the edge of the traveled portion thereof (377, 378). On the west and north of the road south of the bridge, between the road and the river grew bushes and trees which to some extent obstructed the vision of persons going south out of the bridge and approaching the bridge from the south or west (187, 188, 194, 195, 196, 312, 313, 410). The defendant testified that the entrance to the bridge was obscured until he reached a point 30 feet from it (410, 411).

Near the south entrance to the bridge, the highway is about 15 to 16 feet wide; at its widest point on the curve, it is about 17 feet wide and its general width westerly of the curve was about 12 to 14 feet (356, 357, 358, 359, 371, 372). On the southerly and easterly side of the road near the curve was a small stream, fed by a spring, which made the road soft and wet along the outside of the curve (359, 360, 369, 370, 371, 395, 396). In addition there was a fairly sharp drop between the edge of the road on the outside of the curve and the guard rail (153, 154, 360, 361).

Defendant's Exhibit E, being a plan of the scene of the accident, and Defendant's Exhibit A, being a photograph looking toward the south end of the bridge from a point a short distance southwest thereof, will materially assist the Court in visualizing the scene of the collision. Defendant's Exhibit A was marked to indicate the approximate locations of his car and the Wilson car after the collision occurred (391, 392, 393, 394).

The Defendant was driving a V-8 Ford, model 1934 Tudor Sedan (260, 388). On the front seat with him was one of his neices. On the left side of the rear seat was another neice and plaintiff, his wife's sister, was sitting on the right side of the rear seat (191, 197, 198, 268).

As Defendant drove along this dirt road approaching the point where the accident occurred, he was driving in the beaten wheel tracks in the center of the road; it being agreed by all parties that the center was the usual place for traveling except when meeting other vehicles (271, 272, 286, 287, 288, 289, 390). He followed the regular track until he saw the Wilson car (413, 440, 441). In traveling along the dirt road Defendant was driving at about fifteen miles per hour (341, 389, 402, 418, 421, 422). No witness places his speed any higher than that at any time.

Defendant was paying close attention to his driving and there was nothing about his conduct which called forth any comment, protest or suggestion from the plaintiff or any of the other passengers (203, 273, 283, 406). No one made any suggestion to Defendant as to the way he drove the car until the instant before the collision when defendant ejaculated "Oh God" (283).

At the time when defendant's car was approaching the Williams River bridge, from the south, Wilson, who lived some distance north of the bridge, was approaching the bridge from the north (295, 296, 314).

As Defendant approached the curve leading into the bridge he continued to travel in the regular beaten tracks which swung slightly to the left hand side of the road on the curve (191, 198, 271, 272, 273, 303). The tracks did not cut over to the left until they reached the curve (408, 409, 440, 441) and he was traveling in the regular beaten tracks (271, 272, 394).

When Defendant was from twenty-five to thirty feet away from the southerly end of the bridge and rounding the curve, he saw the Wilson car emerge from it traveling towards him (209, 210, 211, 273, 274).

The Wilson car was on its own side of the road, next to the guard rail; it was as far over on its own side of the road as it could get (199, 200, 301, 302, 404, 429).

Wilson testified that he was going only about two miles per hour when he came out of the bridge (341), although defendant's testimony indicates that he was going very materially faster (390, 436, 441, 445). Wilson also testified that he blew his horn before entering the bridge and just before he came out of the bridge (300, 304, 309, 314). There is no testimony that Defendant nor any of his passengers in his car heard the Wilson horn (406, 407).

As soon as Defendant saw the Wilson car come out of the bridge, he pulled hard to the right and slammed on his brakes (191, 192, 199, 304, 390, 394, 409, 441). He had very little time in which to do anything (274, 275, 414, 444).

Wilson saw Defendant's car at about the same instant; he applied his foot and emergency brakes and kept as far over on his own side of the road as possible (302, 304, 305).

The left front end of Wilson's car and the left front of Defendant's car collided as a result of which the Plaintiff received her injuries.

Defendant was thoroughly familiar with the highway at the point where the collision occurred (411, 412). He knew that the curve was dangerous and that in order for two cars to pass at that point, they must be going "at a snail's pace" (420, 421, 423, 424, 436).

From Plaintiff's "bill of particulars" (61, 65) it would appear that plaintiff claims gross negligence because defendant drove to the left of the center of the highway as he approached the curve just south of the bridge, that he was traveling at the grossly negligent and unsafe rate of speed of about fifteen miles per hour and failed to blow his horn or give some other warning as he approached the curve at the southerly entrance to the bridge.

ARGUMENT

I. DEFENDANT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED AS THE EVIDENCE DOES NOT TEND TO SHOW GROSS NEGLIGENCE.

The opinion of the Circuit Court of Appeals contains an accurate and concise statement of Vermont law on what constitutes gross negligence. It may assist this court in consideration of the Vermont cases if we amplify that opinion some.

It has been repeatedly stated by the Vermont Court that there is no concrete rule by which the existence of gross negligence can be determined, for each case must be judged by its own facts. But the facts in each case must be considered in the light of accepted principles of law.

Kelley v. Anthony, (*Vt.*-1939) 8 *Atl.* (2*d*) 641
Hall v. Royce, 109 *Vt.* 99, 104, 192 *Atl.* 193
Powers v. Lackey, 109 *Vt.* 505, 506, 1 *Atl.* (2*d*) 693
Rich v. Hall, 107 *Vt.* 455, 459, 181 *Atl.* 113

The "accepted principles of law," applicable to the determination of the existence of gross negligence, are laid down in *Shaw, Admr. v. Moore*, 104 *Vt.* 529: (See opinion of the Court of Appeals.) They have been repeatedly and consistently followed and their application to the facts here set forth, must govern the decision in this case.

An analysis of the decisions by the Supreme Court of Vermont upon the subject will demonstrate that in every case in which a jury would have been or was justified in finding a defendant guilty of gross negligence, there existed some circumstances which were indicative to the Defendant of the existence of a potentially dangerous situation and a neglect or refusal on the part of the defendant to modify his course of conduct in the face of such circumstances.

Thus in *Powers v. Lackey*, 109 *Vt.* 505, 1 *Atl.* (2*d*) 693, defendant drove into a heavy bank of fog so dense that nothing could be seen beyond the radiator of the car, continued on the left or wrong side of the road for 100 feet and

made a sharp left turn directly in front of an oncoming car proceeding on its own side of the road. In *Farren v. McMahon*, 110 *Vt.* 55, 1 *Atl.* (2d) 726, 727, a warning stop signal of a preceding motorist was disregarded at a time when an approaching car was about to meet and pass and defendant, unable to stop, drove his car into a ditch. In *Hall v. Royce, Supra*, the presence of a car parked on the side of the road ahead of the defendant at night, but which was known by defendant at a time when there was ample opportunity to stop or to turn out and pass safely, was not heeded until too late to avoid collision. In *Senecal v. Bleau, et al*, 108 *Vt.* 486, 189 *Atl.* 139 and *Rich v. Hall, Supra*, the presence of other vehicles approaching at right angle highway intersections although well known to defendants, were wholly ignored by defendants who proceeded forward without any regard for them.

In each of these cases there was an element of culpability disclosed, presenting an omission respecting legal duty of an aggravated character, sufficient to permit a jury reasonably to find what amounted to an indifference to legal duty and to utter forgetfulness of legal obligations so far as the safety of plaintiffs were concerned.

In the instant case, the foregoing rule is wholly inapplicable. Here, although it appears from the evidence that the defendant knew from long acquaintance with the particular section of roadway that in order to meet and pass with safety a vehicle coming from the opposite direction, it was necessary to travel at "a snail's pace," it also appears that the plaintiff had traveled over this particular section of highway on several occasions (194, 287) and made no protest at the manner in which the Defendant was operating his car, because as she says there was no reason for doing so (283). This certainly does not indicate speed of such an aggravated character as denotes indifference or utter disregard on the part of defendant, of plaintiff's safety.

Defendant has been unable to find any judicial determination of "a snail's pace," but submits that the rate of fifteen miles per hour at which the defendant was traveling is not sufficiently in excess of such indeterminate rate as to constitute a "failure to exercise even a slight degree of care,"

or "a heedless and palpable violation of legal duty respecting the rights of others."

Defendant further submits that his failure to keep to the right of the center line of the highway when considered in connection with the undisputed fac. that he was at all times traveling in the usual path or tracks, and that by so doing he was also avoiding the soft spot on the outside of the curve and the sharp drop-off outside the edge of the traveled way, does not constitute so open and palpable a disregard for the safety of the plaintiff as to warrant the finding that he was guilty of gross negligence within the meaning of that term as consistently defined by the Supreme Court of Vermont.

It is conceded that this was a country dirt road, of a type familiarly known as a "backroad," having very little travel. There were but five or six families living along the entire length of it. Approaching traffic was not reasonably to be anticipated, at least in any volume.

As stated by the Circuit Court of Appeals, all the evidence tends to show Defendant was going about fifteen miles per hour. The road the Defendant was driving the car on was such as to necessitate a low speed and to call forth protests of occupants if a car was driven fast over it. There were no such protests.

Wilson testified that he should judge Defendant's car was going over fifteen miles per hour. As the burden of proof was on Plaintiff and the witness was not asked how much faster, this answer cannot be construed as contradicting the other testimony that the speed was about fifteen miles per hour. Wilson saw Defendant's car coming toward him for only an instant before the accident and had poor opportunity to judge its speed.

The only other evidence relied upon by Plaintiff in respect to speed of Defendant's car was (1) Plaintiff said there was an "awful crash" and (2) the left front wheel of Defendant's car drove the right rear wheel of Wilson's car through the guard rail. But such testimony is too indefinite and any attempted inference as to speed so speculative as to make it negligible.

Until the defendant actually saw the Wilson car emerging from the southerly end of the bridge, there is no evidence

that the defendant knew that another car was approaching. Although Wilson testified that he sounded his horn twice, neither the plaintiff nor the defendant heard it. The defendant was only twenty-five or thirty feet from the bridge when he saw the Wilson car. Both the defendant and Wilson agree that the defendant pulled sharply to the right almost immediately. In addition it is apparent from the undisputed testimony with respect to speed and distance that the defendant had slightly more than one second in which to react to the situation confronting him and to put his car in a place of safety.

The plaintiff in this case has apparently based her efforts to recover upon the theory that because an accident occurred, and she received an injury, gross negligence is to be presumed. Such a doctrine does not even apply with respect to ordinary negligence, to say nothing of gross negligence. *Johnson v. Burke*, 108 *Vt.* 164, 168, 183 *Atl.* 495; *Williamson v. Clark*, 103 *Vt.* 288, 291, 153 *Atl.* 448. The burden was upon her to make out a case warranting submission of gross negligence and this set of facts would not sustain the burden. *Kelley v. Anthony, supra.*

In the *Kelley* case the evidence tended to show that defendant entered the curve there involved, at a speed of about fifty miles per hour on the wrong side of the road. It is indicated that should one enter some curves at such a speed and in such a manner, and an accident result from the presence of approaching traffic, it might warrant submission of the issue of gross negligence to the jury, but that there must be something more than an error of judgment or momentary inattention in order to indicate an indifference to the duty owed to a guest or an utter forgetfulness of her safety.

Although the car was out of control after it entered the curve, the court held that there was no evidence of any act or omission of defendant amounting to gross negligence operating as the cause. So the inquiry was as to whether the defendant was grossly negligent after that time, in failing to get control of it, and avoiding the accident, during the approximately four hundred feet before it hit a telephone pole and came to a stop. It was held that there was no evidence from which it could be inferred that defendant could have done anything which he failed to do in the way

of regaining control and keeping the car within the limits of the road, or that he did something which he should not have done in that respect which amounted to gross negligence.

Plaintiff strongly stressed the evidence tending to show that defendant entered the curve in violation of the provisions of P. L. 5110, Subd. IX, which was the section most strongly relied upon there, and which provides:

> "IX *Curves.* All curves shall be approached and entered with due care to avoid accident, and all vehicles rounding the same shall keep as far to the right hand side of the highway as reasonably practicable and proceed with due care to avoid accident";

To that contention, the response of the Court, which is particularly pertinent to the instant case, was as follows:

> "Whether or not there was any negligent violation of P. L. 5110, subd. IX, under the facts and circumstances here disclosed, or negligence in other claimed respects, sufficient to make a jury question as to ordinary negligence, we are not called upon to decide. It is clear that the conduct of the defendant both before and after entering the curve was not such as it could reasonably be inferred was the result of an indifference to his guest or an utter forgetfulness of the latter's safety, and consequently gross negligence is not shown. Franzoni v. Ravenna, supra; Powers v. Lackey, 109 Vt. 505, 1 A 2d. 693."

Judgment on a directed verdict in favor of defendant was affirmed.

In the *Shaw-Moore* case, the fact that defendant drove so close to a guardrail that plaintiff's intestate (standing on the running board) was crushed between it and the car, receiving injuries from which her death resulted, did not make a case for submission to the jury. The Court said that although the jury question might be free from difficulty if addressed to the issue of ordinary negligence, to entitle a guest plaintiff to submission of the issue of gross negligence, the "case must contain an element of culpability of an aggra-

vated character which is substantially and appreciably higher in magnitude than that which characterizes ordinary negligence."

In *Franzoni v. Ravenna, supra,* defendant was driving his car over a road that was deeply rutted, the walls of the ruts being frozen. There were two sets of ruts and instead of taking the ones on the right, he was driving with his right wheels in one set of ruts and his left wheels in the other set. He saw a truck approaching from the opposite direction. Instead of stopping he persisted in attempting to pull out of the ruts. He got his front wheels out but was unable to get the rear wheels out, so he pulled the front wheels back into the ruts. Again he attempted to force the car out of the ruts, and continued in this attempt until it was too late to stop, and the car crashed into the truck, resulting in the plaintiff's injuries. Reversing a judgment in favor of the plaintiff, and holding that there was no liability, the Court used language that is particularly pertinent here: (p. 65)

> "Tested by this rule, the record before us fails to justify a recovery against Ravenna. That he was careless, either in getting into the two ruts he appears to have chosen, or in his persistent attempts to force his car out of them, or both, may be admitted. That he should have stopped his car long enough before he hit the truck to have avoided a collision is quite apparent. But he was all the time trying to avoid an accident. He was doing his best to accomplish that result. He made a mistake, to be sure, perhaps a series of them, but he was not so far wrong as to evoke a protest from any of his passengers, and there is nothing in the record to indicate an indifference to his duty to his guests or an utter forgetfulness of their safety."

So in *Anderson v. Olson, supra,* defendant was driving on a descending road, about twenty-five feet in width, on the right of which was a white guardrail. It was after one o'clock in the morning, but visability was good. It was not claimed that the speed was excessive. He noticed that he was close to the guard rail and fearing his car would collide with it, he swung sharply to the left. The car turned almost

directly across the road, struck a bank, ran part way up it and overturned, resulting in injuries to the plaintiff, a guest passenger. If he had not turned to the left, or if he had not turned so far in that direction, the car would have remained in the road without mishap. Had he applied his brake after making the turn, the accident would not have occurred. He "got nervous and lost his head."

Again reversing a judgment for plaintiff, and again holding there was no liability, under this statute, the Court said: (p. 71, 72)

> "Gross negligence has been defined in *Shaw, Admr. v. Moore*, 104 *Vt.* 529, 531, 162 *Atl.* 373, 86 *A. L. R.* 1139, and *Dessereau v. Walker*, 105 *Vt.* 99, 101, 163 *Atl.* 632, and it is not necessary to repeat what has been stated therein. It is sufficient to say that the foregoing facts do not bring this case within the definition. Negligence there may have been, but nothing appreciably higher in degree and more culpable than that. There must be something more than an error in judgment, momentary inattention, or loss of presence of mind, in circumstances such as these, in order that there may be indicated an indifference to the duty owed to a guest or an utter forgetfulness of his safety. See *Franzoni v. Ravenna*, 105 *Vt.* 64, 66, 162 *Atl.* 564."

In *L'Ecuyer v. Farnsworth*, 106 *Vt.* 180, 170 *Atl.* 677, a verdict was directed for defendant. The judgment thereon was affirmed by the Supreme Court. Plaintiff was a guest passenger in defendant's car which was being driven at his request by a third party. They were driving over the main cement highway between Burlington and Vergennes in the evening. It was cold and raining, the road being slippery in places where the rain had frozen on the paved surface of the highway. Plaintiff had noticed two slippery places and shortly before the accident occurred, she had asked the driver once or twice "not to go too fast." Suddenly the rear of the car skidded to the left, made a half turn on the cement, again skidded and slid backward about two hundred feet, and off the cement and against a tree some six or eight feet from the

shoulder of the road. On the question of gross negligence, the Court held:

> "Even if it could be said that the accident was caused by the negligence of Miss Leonard, there is nothing in the record that indicates an indifference by her to her duty to her guest or an utter forgetfulness of her safety, which is the test of gross negligence. *Shaw, Admr. v. Moore*, 104 *Vt.* 529, 531, 162 *Atl.* 373, 86 *A. L. R.* 1139; *Franzoni v. Ravenna*, 105 *Vt.* 64, 66, 163 *Atl.* 564; *Dessereau v. Walker*, 105 *Vt.* 99, 101, 163 *Atl.* 632; *Anderson v. Olson*, 106 *Vt.* 70, 169 *Atl.* 781 (*decided January Term*, 1934)."

In *Garvey v. Michaud*, 108 *Vt.* 226, 184 *Atl.* 712, plaintiff, a sister-in-law of defendant, was riding as a guest passenger in defendant's car, operated by himself, over the highway between Bristol and New Haven. The road was icy. Defendant was driving twenty-five to thirty miles an hour, following a large truck going in the same direction, and from thirty to seventy-five feet from it. No claim was made that defendant was negligent before he arrived in near proximity to the scene of the accident. As they came to a rising grade defendant followed the truck up the hill, gaining somewhat. He did not try to pass it, but as he neared the top of the hill he noticed that the truck, after it passed over the crest and started down the other slope, did not gain momentum. As defendant passed over the top of the hill the truck was fifty to seventy-five feet ahead of him. The truck, with no stoplight, and without warning, stopped or practically so, while it was going down the hill, and as it was about to meet a car coming from the opposite direction. As defendant came over the top of the hill, he saw that it was slowing down. He applied his brakes, but by reason of the icy condition of the road his car slid down the hill some seventy to one hundred feet and collided with the rear of the truck, the collision causing plaintiff's injuries. He could not turn to the left and avoid the collision because of the approaching car. He could not turn to the right on account of a high bank.

In reversing a plaintiff's judgment and holding that a verdict should have been directed in defendant's favor, the Court said: (p. 233)

> "While the defendant may have made a mistake in judgment, which amounted to negligence, in driving too close to the truck as he followed it up the hill, or in suddenly applying his brakes so that the wheels of his car were set, there is nothing in the evidence that indicates an indifference by him to his duty to his guest, or an utter forgetfulness of her safety. The defendant's operation of his car did not evoke any protest from the plaintiff, although she testified that she did not protest, because she feared if she did he would drive faster.
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> * * * * * * *
>
> "While the defendant may have been negligent in getting into such a perilous situation, he was not wholly to blame for it. Other circumstances, over which he had no control, contributed to that situation. The evidence is sufficient to warrant a finding that the defendant was guilty of negligence in the operation of his car, but it is not sufficient to warrant a finding that he was guilty of gross negligence. The court below erred when it denied the motion of the defendant for a directed verdict. The judgment against the defendant Michaud is reversed, and judgment for him to recover his costs."

The most recent decision of the Vermont Supreme Court which holds that the issue of gross negligence was proper for submission to the jury, is *Ellison v. Colby*, 8 *Atl.* (2d) 637, decided at the same time as *Kelley v. Anthony, supra*, at the October Term, 1939.

This case well illustrated the factual elements which must exist in order to present a jury question on the issue of gross negligence. The accident happened about 1:30 A.M. on October 10, 1938, three or four weeks after the hurricane and flood of September, 1938, on the road from Chester to Rawsonville via Simonsville. Every bridge on the road (there were several) had been washed out at one end or the

other. For at least six miles the road was under construction and repair. Defendant had driven over it earlier in the evening and had traversed two-thirds of the distance on the return trip. Flares and other warning signs and danger signals existed, including such "down away from the bridge (where the accident happened) below it, so as to give anyone ample chance." There had been a big washout at the east end of the bridge where the accident happened. It had been filled in with sand and soft dirt, over which there was a temporary roadway about nine feet wide, the traveled portion of which had been packed reasonably hard by the dual wheels of the construction trucks which dumped the fill. There was nothing to prevent cars from going off the sides of the fill at the approach to the bridge except that a bank of fill material about two feet high by three feet wide had been pushed up on either side. The nine foot passageway was about at the center of the bridge opening, so that one traveling over the bridge had to travel in the middle, otherwise his right wheels would strike into the soft material of the embankment at the right. Or if he traveled to the left of the middle, his left wheels would strike the soft material of the embankment at the left. The driver had been cautioned on the way over once or twice about his speed, but notwithstanding that, and aware of the condition of the road, on his return trip at 1:30 o'clock in the morning, he increased his speed to around fifty miles per hour, and as his car crossed the bridge, the right wheels hit the soft fill of the embankment, plowed off the highest part of it for a distance of twelve to fifteen feet, went down the embankment, tipped over, and injured the plaintiff. Affirming a plaintiff's judgment, the Court held:

> "Under these circumstances and others disclosed by the evidence it was competent for the jury to infer that the act of the defendant in crossing the bridge and driving upon the fill at a speed of around fifty miles per hour was not due to momentary inattention, error in judgment or loss of presence of mind, but was a failure to exercise even a slight degree of care and was the result of an indifference to his duty to his guests or an utter forgetfulness of the latter's safety."

For the convenience of the Court we refer to the remaining cases other than those hereinbefore referred to, which have come to our attention, construing the "gross negligence" statute, and which have approved submission of the issue to the jury.

In *Dessereau v. Walker*, 105 *Vt.* 99, the plaintiff and defendant, together with five others, were returning from the Morrisville fair to Barre, sometime after midnight in a Model T Ford roadster with a rumble seat. There was a heavy fog which obscured the sight of the road and caused the lights to reflect back. The windshield was opaque from the moisture of the fog. The wiper was not in operation. The defendant drove leaning out to the left of the car, looking around the edge of the windshield. More than once the plaintiff warned the defendant to go slower, because of the bad night and the crowded condition of the car. Several of the others remonstrated. The warnings were numerous and repeated. Between one and two hundred feet of a sharp curve they entered a bank of fog so dense that the guard rails alongside the road were invisible. The car was being operated at about forty miles per hour, on the left hand side of the road. It struck a soft shoulder on the outside edge of the curve, went off the highway and was overturned causing plaintiff's injuries.

Holding that a defendant's motion for a verdict was properly over-ruled, and judgment rendered for plaintiff, the opinion concludes:

> "In view of the evidence of the speed of the car, the lack of visibility, the heavy load due to the number in the automobile, and the repeated warnings from the other members of the party, we think that it cannot be said as a matter of law that there was a lack of evidence fairly and reasonably tending to show that the defendant was guilty of conduct which contained an element of culpability of an aggravated character substantially and appreciably greater in magnitude than that which characterizes so-called ordinary negligence, and amounting to gross negligence within the definition of that degree as hereinbefore stated. There was no error in the denial of the motion."

The remaining case is *Hunter v. Preston, et als*, 105 *Vt.* 327. In that case plaintiff, a guest passenger of one Midgely, a defendant, received injuries when Midgely's car collided with Preston's car which was parked on North Avenue in Burlington. The evidence showed that Midgely was driving at night over an icy, slippery street, without chains, and knew the dangerous condition of the highway. Other evidence showed that he was traveling thirty-five to forty miles an hour. He was blinded by the lights of the car of one Hinsdale, another defendant, which was standing on the opposite side of the street facing the direction from which Midgely was coming, so that he was unable to see Preston's car, parked on Midgely's right hand side of the street until he was within thirty-five to fifty feet. He then applied his brakes, but hi car slid over the icy surface crashing into Preston's car, weighing with its load 3,500 pounds, with such force as to move it ahead its full length.

The Court held the evidence made a case for the jury on the same issue of gross negligence, but not of "wilful" negligence, as Midgely did not see the Preston car until it was too late to avoid it. As the complaint charged him both with gross negligence and with wilful negligence, and both issues had been submitted to the jury, the judgment was reversed for the error in submitting the question of wilful negligence.

One needs but to compare the factual situations in the cases wherein the Court has held the issue of gross negligence properly submitted, with those in which the Court has ruled as a matter of law, that the evidence presented no question for the jury, to note the distinction which it makes between the two classes of cases. The fundamental element which characterizes the former is the presence of evidence of negligence of an aggravated character which clearly denotes "an indifference to his duty to his guest and an utter forgetfulness of the latter's safety."

It is most respectfully insisted that such an element is totally lacking in the instant case, and that in the view most favorable to the plaintiff, her case falls within the latter class.

The evidence in the case, taken in the light most favorable to the plaintiff, wholly refutes any claim of a "failure to exercise even a slight degree of care." It fails to establish

"any act or omission" on the part of the defendant "respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care." It precludes a finding of "very great negligence, or the absence of slight diligence or the want of even scant care."

To hold that defendant's conduct could be found to be "a heedless and a palpable violation of legal duty respecting the rights of others" and to "amount to indifference to present legal duty, and to utter forgetfulness of legal obligation so far as other persons may be affected," would amount to completely repealing the so-called "guest" statute and to saying that any case which presented a situation where the ordinary rule of negligence applied was sufficient evidence upon which gross negligence could be found. This would be contrary to the repeated declarations of the "applicable principles of law" to cases where the establishment of gross negligence is essential under the statute to entitle the plaintiff to recover. Unless this well established distinction is recognized and observed all negligence will gradually be absorbed into the classification of gross negligence (see *Quinlivan v. Taylor* (*Mass.*) 10 *N. E.* (2*d*) 96; the statute will become meaningless, and the object and purpose of the Legislature in changing and modifying, by statute, the rule of the common law, will be completely and effectively thwarted and set aside.

The law of Vermont, as interpreted and applied by its highest Court has consistently observed this distinction between ordinary negligence and gross negligence, and preserved the object and purpose of the statute, and it governs the determination of the issues presented by this exception. Under the law of Vermont, there was no question for submission to the jury on the issue of gross negligence.

II. THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT DID NOT ERR IN ORDERING A DISMISSAL OF PLAINTIFF'S COMPLAINT.

Plaintiff claims that the Court of Appeals upon reversing the case, had a right only to order a new trial and could not dismiss the complaint, because Defendant failed in the Dis-

trict Court to move to set aside the verdict and judgment. This question turns on the application of Rule 50(b) of the Rules of Civil Procedure for the District Courts of the United States set out below.*

In *Slocum vs. New York Life Insurance Company*, 228 *U.S.* 364, 57 *L. ed.* 879 this Court held that it was a violation of the Seventh Amendment for a United States Court on appeal to enter judgment for the Defendant after ruling that the Defendant's motion for a verdict made before submission to the jury and without reservation was improperly denied, and that the Plaintiff was entitled to a mandate ordering a new trial.

Had the instant case been tried prior to the adoption of Rule 50(b), it is clear from that decision and *Aetna Insurance Company vs. Kennedy*, 301 *U. S.*, 389, 81 *L. ed.* 1177, that the Circuit Court of Appeals would have committed error in dismissing the complaint.

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*Rule 50—Motion for a Directed Verdict.

(b)—Reservation of Decision on Motion.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

In *Baltimore and Carolina Line Inc. vs. Redman*, 295 *U. S.* 654, 79 *L. ed.* 1636 this Court held that where the Trial Court reserved decision on a motion made for verdict by Defendant before submission to the jury, and after verdict, denied the motion, the Appellate Court upon finding that the motion should have been granted, could dismiss the complaint. It is apparent from the reported case that no motion to set aside the verdict was made.

This Court found this procedure to be in accordance with common law practice before adoption of the Seventh Amendment, and therefore not in violation of it.

Rule 50(b) was adopted to make self operative the procedure approved in the *Redman* case. Its purpose was to speed litigation and to prevent unnecessary retrials. (See *Montgomery, Ward & Co. vs. Dunton, decided December* 9, 1940, 85 *L. ed. Adv. Ops.* 132, 136.) It sought to incorporate into the practice of the District Courts of the United States a rule of procedure of the common law recognized prior to the adoption of the Seventh Amendment, which permits Appellate Courts to reverse judgments rendered upon jury verdicts and enter final judgment in behalf of the party against whom verdict and judgment have been rendered.

It is no longer necessary for the District Court to say that it reserves decision on the motion for a verdict. The rule expressly qualifies the denial with a reservation of decision, which makes it possible for the Appellate Courts to enter judgment for the moving party. That reservation in and of itself and without anything more than entry of judgment, makes operative the practice of common law as it was before adoption of the Seventh Amendment.

After verdict, either of its own motion or as provided in the Rule, upon the filing of a motion to have the verdict set aside, the Court must finally rule upon that motion for a verdict.

The Plaintiff claims in her brief that in addition to the formal reservation of decision, pending the jury verdict, the common law practice required a new motion after verdict (Petitioner's Brief, Pages 22 and 23). No case cited supports that contention.

The common law practice did not require or even contemplate the making of a new motion after verdict. In case

of reservation, the original motion (not a later one) was disposed of by the Court.

The decisions in *Baltimore and Carolina Line Inc. v. Redman, Supra* and in *Lewis-Kures et al vs. Walsh & Co. Inc.*, 102 *Fed. 2nd* 42, 44 certiorari denied 308 *U. S.* 596, 84 L. ed. 499 demonstrate that Plaintiff's contention is erroneous.

Rule 50(b) was not intended to change the common law rule by requiring new motions to be filed after verdicts.

The provisions of Rule 50(b) which permit a new motion within ten days after verdict serve a useful purpose in permitting a party who has moved for a directed verdict to prepare and advance, if he so chooses, a more accurate and studied presentation of his grounds and arguments, than is possible in open court during the period between the closing of the evidence and the submission of the case to the waiting jury. Such right is for the benefit of the moving party, if he expects that the opportunity for a more considered presentation and ruling will alter the position of the Court. A new motion should not, however, be held to be a condition precedent to the exercise by the Appellate Court of the power to render final judgment upon his motion.

The District Court may finally pass upon the question reserved either by expressly granting or denying it and then enter judgment, or by entering judgment alone. The entry of judgment necessarily carries with it a ruling upon the motion.

The Court having reserved final decision, must dispose of the matter in some way. If it does not act upon this matter separately before judgment, the judgment itself must and does constitute a ruling on the motion.

The judgment necessarily disposes of all questions then pending in the case. In this case a judgment for Defendant without more after verdict would have been a ruling granting the motion for a verdict. As the judgment did not grant the motion for a verdict then pending, it denied it.

The Court might have made another express and separate ruling on the motion but no action the Court could have taken would more effectually deny the motion than entry of judgment for the plaintiff.

Therefore in this case denial of the motion for direction of a verdict before the verdict was rendered, according to the terms of the Rule, automatically reserved decision and the entry of judgment for the Plaintiff after the verdict was rendered was action on the question reserved and a final denial of the motion. The Court of Appeals, therefore, upon finding that the motion should have been granted, was wholly within its rights in taking the action, which the Trial Court should have taken, namely, granting the motion and ordering that Plaintiff's complaint be dismissed.

The Seventh Amendment was not violated. The Rule was complied with. The decisions in *Baltimore and Carolina Line, Inc. vs. Redman* and *Lewis-Kures et al v. Walsh & Co., supra* apply.

CONCLUSION

Respondent submits, therefore, that the judgment of the Circuit Court of Appeals for the Second Circuit in reversing the judgment of the United States District Court for the District of Vermont and in dismissing Petitioner's complaint should be affirmed.

Respectfully submitted,

GEORGE H. O'BRIEN.
By EDWIN W. LAWRENCE,
LEONARD F. WING,
R. CLARKE SMITH,
His Attorneys.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1940.

Margaret Conway, Petitioner, vs. George H. O'Brien. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioner, a citizen of New Hampshire, was injured when the respondent's car, in which she was a passenger, collided with another on a country road in Vermont. Diversity of citizenship gave jurisdiction to the District Court and petitioner recovered a verdict under the Vermont guest occupant law,[1] which required her to prove gross negligence on the part of the respondent. The Circuit Court of Appeals, however, considering the evidence of gross negligence insufficient to go to the jury, reversed and dismissed the complaint.[2] We granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) to authorize dismissal of the complaint,[3] but our view of the merits makes it unnecessary to discuss this question.

The result is determined by a consideration of the facts in the light of the Vermont law. The accident occurred in broad daylight in the late morning of an August day. If the facts most favorable to the petitioner were accepted, the jury might have concluded properly that the defendant's car approached from the south a covered bridge on a little used country road at a speed of fifteen miles per hour. Respondent who was the driver and owner sat on the front seat with another. The petitioner and another lady occupied the rear seat. The bridge spanned Williams River which at that point ran eastwardly to join the Connecticut. As another car emerged from its southern end the collision happened.

[1] Vermont Public Laws (1933) § 5113.

[2] 111 F. (2d) 611.

[3] As in Berry v. United States, decided today, the District Court denied respondent's motion for a directed verdict at the close of the case. After verdict, however, the respondent did not make a motion for judgment n.o.v.

The road along which respondent was driving ran parallel with the southernly bank of the river for a short distance and then turned "abruptly," in a "sharper curve than any on the road," at a sixty degree angle down a nine per cent grade towards the bridge. Bushes and small trees cut off the view of a car "coming out of the bridge" until the respondent's car was "probably 30 feet" away.

As respondent's light car came into this curve, he cut in to the left without slackening speed or blowing a horn and suddenly found himself face to face with a larger car coming out of the bridge on its right hand side of the road at two miles per hour. The collision knocked the heavier car backward several feet and through a guard rail on the west side of the bridge approach. The road approaching the bridge "at this blind corner" was sandy, from fourteen to seventeen feet wide. Respondent testified he had known the spot "all my life" and knew cars could pass only "at a snail's pace."

The "Law of the Road" in Vermont is to round curves "as far to the right . . . as reasonably practicable"[4] and to "signal with bell or horn" "in going around a curve."[5]

Under these circumstances we are of the opinion that the Vermont law requires the submission of the question of gross negligence to the jury. As a matter of law it seems quite plain that a jury might find a driver of a car familiar with the locality grossly negligent, when with three guests and without a signal he rounds a blind, sharp curve at fifteen miles per hour on the wrong side into a narrow bridge entrance. The accepted Vermont definition of gross negligence is found in *Shaw* v. *Moore*:[6]

"Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others.

[4] Vermont Public Laws (1933) § 5110-IX.
[5] *Id.*, § 5110-XV.
[6] 104 Vt. 529, 531-532.

The element of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure."

This has been repeated many times in later cases.[7] The application creates the difficulties. The latest cases say "each case must be judged according to its own facts."[8] Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case.[9] About as many are upon the other side.[10] We think the District Court correctly appraised the law and facts.

We reverse the judgment of the Circuit Court of Appeals and affirm that of the District Court.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[7] Dessereau *v.* Walker, 105 Vt. 99, 101; Franzoni *v.* Ravenna, 105 Vt. 64; Hunter *v.* Preston, 105 Vt. 327, 338.

[8] Ellison *v.* Colby, 8 A. (2d) 637, 640; Kelley *v.* Anthony, 8 A. (2d) 641, 642.

[9] Shaw *v.* Moore, 104 Vt. 529; Franzoni v. Ravenna, 105 Vt. 64; Anderson *v.* Olson, 106 Vt. 70; L'Ecuyer *v.* Farnsworth, 106 Vt. 180; Garvey *v.* Michaud, 108 Vt. 226; Kelley *v.* Anthony, 8 A. (2d) 641.

[10] Dessereau *v.* Walker, 105 Vt. 99; Farren *v.* McMahon, 110 Vt. 55; Hunter *v.* Preston, 105 Vt. 327, 338; Hall *v.* Royce, 109 Vt. 99, 106; Ellison *v.* Colby, 8 A. (2d) 637; Powers *v.* Lackey, 109 Vt. 505.